
SB
29

COMMITTEE REPORT

HOUSE

FURTHER: FINANCE

Date: April 11, 1995

The Committee on HESS has had CSSB 29(Jud)am

"An Act relating to domestic violence and domestic sexual offenses."

under consideration and recommends:

[√] do pass [ ] do not pass

[ ] do pass with attached amendments(s)

[ ] replace with CS for _____ [ ] same title [ ] new title

and recommends _____

[ ] AND attaches a "Letter of Intent" [ ] New Fiscal Note [ ] Zero Fiscal Note Attached

[ ] reports it back without recommendation

[ ] referred to the _____ Committee

MEMBERS SIGNING DO PASS

Mo Brantley

Katie Hurley

Dave Donley

MEMBERS HAVING OTHER RECOMMENDATIONS:

Robin L. Taylor no bill

CHAIRMAN

Mo Brantley
Co Chair

Alaska State Legislature

CO-CHAIRMAN
FINANCE COMMITTEE

907-465-3740

JAN FAIKS
POUCH V
CAPITOL BUILDING
JUNEAU, ALASKA 99811

Senate

March 18, 1985

MEMORANDUM

TO: Committee Members,
House Committee on Health, Education & Social Services

FROM: Senator Jan Faiks

SUBJECT: Background of CS for Senate Bill No. 29 am, an Act relating to domestic violence and domestice sexual offenses.

Chapter 35, Title 25 of the Alaska Statutes provides a powerful tool for victims of domestic violence.

Under this chapter, abused persons may petition the courts for an order which, among other things, can prohibit the abuser from entering the victim's home, can prohibit communication with the victim, and can require the abuser to pay the victim's medical costs. In an emergency situation, this restraining order can be obtained almost immediately, even before the abuser is given an opportunity to appear at a court hearing.

Under current law, however, this remedy is available only to victims who lives in a spousal relationship or who lives in the same "social unit" as the abuser.

Section 6 of this bill will extend this protection to child, parent, and grandparent victims of abuse. By expanding the definition of victims to include these persons, this section will allow children, parents, and grandparents to seek restraining orders against their abusers.

Section 5 of the bill qualifies those persons who can request restraining orders on behalf of minor children. Since only a parent, guardian, or legal custodian can seek protection under this chapter for a youngster under eighteen years of age, this provision will prevent nosey neighbors and adolescents who are upset with home discipline from filing petitions. (Children who are truly abused by their parents will still be protected by remedies available to the Division of Family and Youth Services-including removing the children from their home.)

Sections 3 and 4 will make this expanded definition consistent in other statutes which deal with domestic violence. AS 12.25.030(b) allows a police officer without a warrant to arrest an abuser even if he did not witness the abuse. AS 18.66.900(3) defines domestic violence in the chapter which spells out the responsibilities of the Council on Domestic Violence and Sexual Assault.

RECEIVED
FEB 25 1985

Office of Administrative Director
Alaska Court System

Superior Court
State of Alaska
FIRST JUDICIAL DISTRICT
415 MAIN STREET, ROOM 402
KETCHIKAN, ALASKA
99901

Chambers of
THOMAS E. SCHULZ, Presiding Judge

February 20, 1985

Karla L. Forsythe
General Counsel
Office of the Administrative Director
303 K Street
Anchorage, Alaska 99501

Re: CS for Sentate Bill 29
Your Memo of February 11

Dear Ms. Forsythe:

I have reviewed the above referenced senate bill and I don't have any particular problems with it. I was one of those folks who wondered what the hell they'd done to us now when the domestic violence legislation first appeared, but it seems to work very well.

I am particularly interested in the addition of the language covering children. I recently dismissed a couple of domestic violence petitions because they involved conduct allegedly directed toward children who were no longer a member of the respondent's household and I had substantial questions about the jurisdiction of the court to proceed in such a case. Senate Bill 29 would appear to clear that matter up and I think it is a necessary addition to the domestic violence statute.

Very truly yours

Thomas E. Schulz

Thomas E. Schulz
Presiding Judge

TES:ju

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

M E M O R A N D U M March 18, 1985

SUBJECT: Amendment to CSSB 29 (Jud)

TO: Senator Rick Halford

FROM: George W. Edwards GWE
Legislative Counsel

The accompanying amendment to CSSB 29 (Jud) has been drafted as you requested. As explained in a separate memorandum, the amendment appears to conform to constitutional and legislative rule requirements. One subject we discussed only briefly should be further considered now that you have the bill.

As drafted section 2 provides an affirmative defense of marriage in sexual abuse of a minor cases-e.g. statutory rape situations. The language specifies that the defense does not apply if the offense was committed without the consent of the victim. The language appears to me to be redundant in that consent is not an element of proof in sexual abuse of a minor cases. They only concern consensual sexual relations by definition. Nonconsensual sexual relations, involving a minor or adult victim are under the sexual assault statutes, AS 11.41.410 and 420.

I can't think of a situation where nonconsensual sexual relations between spouses would be charged as sexual abuse of a minor rather than the more serious sexual assault. If the language is in fact redundant and unnecessary, it is best not to encourage the courts to try to figure out some subtle intent.

GWE:lmb
L4/057

(c) Initial Brief of Appellant, State of Florida, arguing that Florida's sexual battery statute, which codifies the crime of rape, makes no mention of and does not include a marital exemption. The legislature in repealing the rape statute and enacting the sexual battery statute did not preclude charging a husband for the forcible sexual battery of his wife.

4. Commonwealth v. James K. Chretien, 417 N.E.2d 1203 (Mass. 1981), appeal of defendant-husband's conviction of rape of his wife. At trial, defendant's motion to dismiss the rape indictment based on the "common law" spousal exemption was denied. On September 21, 1979, defendant was convicted by a jury of rape and breaking and entering, and was sentenced to 3-5 years in prison and three years probation after release. On March 9, 1981, the Massachusetts Supreme Court, in an unanimous opinion, affirmed the conviction, holding that a person may be prosecuted for and convicted of rape even if the rape victim is defendant's spouse.

(a) Massachusetts Supreme Court unanimous opinion, 417 N.E.2d 1203 (1981), holding that the legislature's revision of the rape statutes in 1974 eliminated any "common law" spousal exemption. The court analyzes the history and bases for the alleged common law doctrine. The court finds that the legislative intent to criminalize marital rape is evidenced in the state's "Domestic Violence Act" (G.L. ch. 209A) which expressly defines "abuse" to cover and include sexual abuse. The court does not limit its holding to separated or estranged spouses; the terms of Massachusetts' revised rape statute clearly applies to married couples who are living together. Clearinghouse No. 31,712.

5. People v. John De Stefano, 121 Misc.2d 113 (Suffolk County, New York 1983), defendant-husband's motion to dismiss rape indictment denied and New York's express statutory marital rape exemption, Penal Law Section 130.00(4), held violative of equal protection clauses of the State and Federal Constitutions.

(a) Suffolk County Court Decision (Judge Rohl), beginning the opinion with a quote from John Stuart Mill's The Subjection of Women, the court holds that the section of New York's rape law which provides a partial spousal rape exemption violates the equal protection clauses of the State and Federal

(b) Brief of Appellant, State of Florida, arguing that the repeal of Florida's rape statute and enactment of the sexual battery statute indicate the legislature's intent to abolish any marital rape exemption. Reiterates the arguments in State v. Smith, 401 So.2d 1126 (1981). Addresses the argument that, absent a marital rape exemption, droves of "vengeful wives" would threaten or bring unfounded rape charges against their husbands in order to get better divorce settlements. The state points out that this "floodgate argument" is highly unrealistic given the emotional and societal pressure on rape victims which discourage disclosure of sexual violence, the traumatic nature of rape trials, the special difficulty interspousal rape victims would have in proving the absence of consent and the reluctance of police and prosecutors to interfere in "family matters" which discourages victims of spouse abuse from seeking legal remedies. State argues that Griswold v. Connecticut, 381 U.S. 749 (1965), recognized the right of married persons to freely make choices concerning their home lives, and that there is no analogous "freedom" to sexually batter one's spouse. Griswold concerns both spouses' interest in privacy, whereas the marital rape exemption involves recognizing one spouse's right to privacy as superior to the other's right to protection and bodily integrity. Furthermore, the right to marital privacy recognized in Griswold promotes marital harmony, whereas the marital rape exemption perpetrates family violence. Clearinghouse No. 36,890.

7. Ronald E. Weishaupt v. Commonwealth of Virginia, 315 S.E.2d 847 (1984). Defendant-husband's appeal of denial of his motion to dismiss, and of his conviction of rape of his estranged wife, on the grounds that an English "common law" marital rape exemption applies in Virginia. The Virginia rape statute is "silent" (contains no express exemption). Trial court denied defendant's motion to dismiss; he was tried before a jury and convicted and sentenced to two years in prison. Virginia Supreme Court affirmed.

(a) Virginia Supreme Court Decision, 315 S.E.2d 847 (1984) holding that a wife can unilateraly revoke her implied consent to marital sex where she has made manifest her intent to terminate the marital relationship by living apart from her husband, refraining from voluntary intercourse with him, and in general conducting herself in a way which establishes a de facto end to the marriage. Here, wife had established her own residence, although no divorce or other legal action had been initiated at the time of

National Center on Women & Family Law

799 Broadway, Room 402 • New York, New York 10003 • (212) 674-8200

MARITAL RAPE LITIGATION

The following pleadings and materials are available from NCOWFL unless asterisked. If asterisked, they are available from Clearinghouse for Legal Services, 500 North Michigan Avenue, Suite 1940, Chicago, Illinois 60611.

1. State of New Jersey v. Albert Smith, 426 A.2d 38 (1981), appeal of defendant-husband's motion to dismiss charges of rape of his wife on the grounds that the criminal rape statute codifies the alleged common law marital rape exemption. Defendant's trial motion was granted, 148 N.J. Super 219 (Law Div. 1977). The Appellate Division affirmed the dismissal, 169 N.J. Super 98 (App. Div. 1979). The Supreme Court of New Jersey unanimously reversed the dismissal and reinstated the indictment for rape.

   *(a) New Jersey Supreme Court 27 page opinion, and concurring opinion (J. Sullivan), 426 A.2d 38 (1981), holding that New Jersey's former rape statute, having no express exemption, did not incorporate or codify a "common law" marital exemption to rape. The Court discusses at length the doubtful origins and authority of the alleged "common law" rule (Hale's doctrine), concluding that "[n]either was the law of this State under the former rape statute as blind to personal liberty and privacy as defendant would have this Court believe. A man separated from his wife - and perhaps one not separated - could not invoke an outdated and doubtful rule to avoid prosecution for rape simply because he was still legally married to his victim." (p. 27) Clearinghouse No. 30,489.

   *(b) Amicus Brief of the National Center on Women and Family Law, Inc., arguing that the exclusion of married women from the protection of the criminal law when they are raped by their husbands is a denial of equal protection. Clearinghouse No. 30,489.

2. State of New Jersey v. Daniel Morrison, 426 A.2d 47 (N.J., 1981) defendant-husband's pretrial motion to dismiss rape charges was denied; defendant subsequently stood trial and was convicted and sentence for raping his estranged wife. The Appellate Division, by per

curiam decision, summarily reversed defendant's conviction for rape (Docket No. A-271-78, decided Jan. 18, 1980; unpublished). Supreme Court of New Jersey reversed Appellate decision, reinstating the rape conviction based on their decision in State v. Albert Smith, supra.

(a) Petition for Certification and Appendix on behalf of the State of New Jersey (dated February 19, 1980), which includes a copy of Appellate Division's per curiam decision reversing rape conviction. The State argues that the alleged "common law" marital rape exemption does not extend to estranged marriages.

(b) Brief and Appendix for the State of New Jersey on appeal to Appellate Division of Superior Court.

3. State of Florida v. Larry Smith, Fla. App. 401 So.2d 1126 (1981), appeal of defendant-husband's pretrial motion to dismiss the charge of sexual battery on the grounds that the criminal statute codifies a pre-existing "common law" marital exemption. Defendant's motion was granted (order dated July 30, 1980). The State appealed the lower court's dismissal of the sexual battery charge. The Florida District Court of Appeal, Fifth District, held that no exemption existed in Florida, and reversed the trial court's order; Husband must stand trial for rape of his wife.

*(a) Florida Court of Appeal, Fifth District Decision, holding that Florida's sexual battery statute does not incorporate a marital exemption. The court reviewed at length the New Jersey Supreme Court's decision in State v. Smith, 426 A.2d 38 (1981), and relied heavily on the New Jersey court's reasoning. The Florida court noted that sexual battery is a crime of violence, not sex. Additionally, the court pointed out the absurdity of defendant-husband's claim under the current sexual battery statute, which prohibits nonconsensual sexual conduct between persons of the same or different sex. "In Hale's time, a man could not be the victim of rape, but under section 794.011, Florida Statutes, he can be. It is inconceivable that a husband would accept the argument that by marriage he consented to the conduct defined in the statute if inflicted upon him by force or violence." 401 So.2d 1129. [Clearinghouse No. 31,552.]

(b) Amicus Brief of the National Center on Women and Family Law, Inc., and Central Florida Legal Services, Inc., arguing that the exclusion of married women from the protection of the criminal law when they are raped or sexually battered by their husbands is a denial of equal protection.

(c) Initial Brief of Appellant, State of Florida, arguing that Florida's sexual battery statute, which codifies the crime of rape, makes no mention of and does not include a marital exemption. The legislature in repealing the rape statute and enacting the sexual battery statute did not preclude charging a husband for the forcible sexual battery of his wife.

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Constitutions. The court discusses U.S. Supreme Court decisions which recognize a woman's autonomy within the marital relationship, and finds that permitting "any type of exemption amounts to the state impermissibly interfering in the marital relationship by granting to a husband the right to control their wives bodily integrity." The court notes that false reports and evidentiary problems are not unique to marital rape cases and do not justify removing an entire class of potential victims from the protection of the law. The court demonstrates that other "remedies" are not necessarily sufficient to protect wives, by pointing out that in this case the woman had already obtained an order of protection before her husband raped her at knifepoint. Clearinghouse No. 36,888.

6. State of Florida v. William Rider, 449 So.2d 903 (C.A.3d Dist., 1984). Appeal by the State of Florida from trial court's dismissal of sexual battery charge against husband. Trial court's dismissal based upon husband and wife living together at the time of the rape. District court finds that no marital rape exemption exists in Florida, and reverses trial court's dismissal, with directions to reinstate the prosecution.

(a) Florida Court of Appeal, Third District Decision, 449 So.2d 903 (1984) holding that Florida's sexual battery statute does not incorporate a common law marital rape exemption even when the spouses are living together at the time of the assault and neither party has initiated a divorce action, obtained a protective order or entered into a separation agreement. The court criticizes the Hale doctrine and expressly finds that no common law exemption to rape ever existed in Florida. The court relies on State v. Smith, 401 So.2d 1126 (5th DCA 1981), and rejects any distinction based upon the fact that the parties were living together at the time of the assault. The court goes on to find even assuming a common law exemption existed in Florida at one time, the legislature's repeal and replacement of the Florida rape statute with a gender-neutral sexual battery statute was "more than sufficient to abrogate any implied consent' upon which a common law interspousal exception may be based." Clearinghouse No. 36,390.

(b) Brief of Appellant, State of Florida, arguing that the repeal of Florida's rape statute and enactment of the sexual battery statute indicate the legislature's intent to abolish any marital rape exemption. Reiterates the arguments in State v. Smith, 401 So.2d 1126 (1981). Addresses the argument that, absent a marital rape exemption, droves of "vengeful wives" would threaten or bring unfounded rape charges against their husbands in order to get better divorce settlements. The state points out that this "floodgate argument" is highly unrealistic given the emotional and societal pressure on rape victims which discourage disclosure of sexual violence, the traumatic nature of rape trials, the special difficulty interspousal rape victims would have in proving the absence of consent and the reluctance of police and prosecutors to interfere in "family matters" which discourages victims of spouse abuse from seeking legal remedies. State argues that Griswold v. Connecticut, 381 U.S. 749 (1965), recognized the right of married persons to freely make choices concerning their home lives, and that there is no analogous "freedom" to sexually batter one's spouse. Griswold concerns both spouses' interest in privacy, whereas the marital rape exemption involves recognizing one spouse's right to privacy as superior to the other's right to protection and bodily integrity. Furthermore, the right to marital privacy recognized in Griswold promotes marital harmony, whereas the marital rape exemption perpetrates family violence. Clearinghouse No. 36.890.

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the rape. The court refers to Virginia's no-fault divorce law as evidence that either spouse can voluntarily terminate the marriage, and cites cases demonstrating the separateness and independence accorded women in Virginia's property law and other areas of criminal law. The court finds the application of an English common law exemption inappropriate in the instant case, but refuses to expand its holding beyond the facts presented, i.e, to cases where the spouses are living together and there has been no manifestation of an intent to terminate the marital relationship. Clearinghouse No. 36,885.

(b) Brief of Appelle State of Virginia, arguing that the English common law exemption should not be applied since it is repugnant to the principles of the Bill of Rights, and that the exclusion of the word "unlawful" from newly-amended Virginia rape statute indicates a legislative intent to abandon the exemption. Clearinghouse No. 36,889.

CASE CHARTS

Case-by-case chart of marital rape prosecutions, including legal and sociological data, and brief narration of facts and outcome of each case. California Cases Chart, $6.00 (Note: California averages a 75% conviction rate); National Cases Chart, $20.00. Available from the National Clearinghouse on Marital Rape, 2325 Oak Street, Berkeley, CA 94708. (NOT AVAILABLE FROM NCOWFL).

11. 41. 445(a)

APPENDIX II

State-by-State Information on Marital Rape Exemption Laws

by Joanne Schulman

Staff Attorney with the National Center on Women and Family Law, Inc.

A husband's rape of his wife is not a crime in most states. This legal right of wife rape is known as the "marital rape exemption," and is included in most states' rape statutes.

There are many types of marital rape exemptions. The state-by-state summary divides the exemptions into the following categories.

CATEGORY

1 — *Absolute Exemption.* A husband can never be prosecuted for rape of his wife so long as the parties are married. The exemption still applies even if the parties are separated by court order. The exemption only ends when the parties are divorced; when the man is no longer *legally* the victim's husband.

2 — *Partial Exemption.* A husband can be prosecuted for rape of his wife in some circumstances. Some states allow prosecution if the rape occurred after one spouse filed papers in court to end the marriage, or when the parties were not living together. The event or circumstance that ends the exemption differs from state to state.

3 — *Cohabitant Exemption.* A man who is living with a woman that he is not legally married to cannot be prosecuted for raping her. Often this exemption is stated as a "defense," rather than a bar to prosecution. Thus, the district attorney may institute rape charges against the man, but he cannot be convicted of rape if he can prove he was living with the victim.

4 — *Voluntary Social Companion Exemption.* This exemption may apply to husbands, cohabitants and social companions (i.e., dates). There is no requirement that the rapist live or have lived with the victim. Most states that have this type of exemption require that there have been past voluntary sexual relations between the defendant and victim in order for the exemption to apply. However, West Virginia does not require any past sexual activity.

CATEGORY	
5	*Silent Statute.* The law does not mention whether husbands may or may not be prosecuted for rape of their wives. It has been assumed, until recently, that husbands could *not* be prosecuted because of Hale's alleged "common law" marital rape exemption. However, recent lawsuits in New Jersey, Massachusetts and Florida have held that no "common law" exemption exists. Thus, it is not clear if husbands can be prosecuted for marital rape in these "silent" states. Whether marital rape is a crime in these states will depend on future judicial decision, or legislative interpretation of the statutes.
No Exemption	The marital rape exemption has been abolished; husbands can be charged with rape of their wives in all or most cases.
Rape Degrees	In some states, there are different "types" of rape, murder, assault, etc. In most states, the criminal laws punish rape more or less severely depending on the circumstances of the rape (e.g., whether a weapon was used; age, mental and/or physical condition of the victim; whether the assault involved illegal sexual penetration, conduct, contact or use of a foreign object). These differences in the law are called "degrees." It is not possible to give a uniform definition for each "degree" as each state bases its rape degrees on different factors. (The fact that the marital rape exemption may apply in some rape degrees and not others has political and practical significance. The law is saying that it will tolerate certain violence by husbands against their wives that it will not tolerate between strangers. Practically, the different application of the exemption, based on the degree of rape charged, may decide whether marital rape cases will ever be prosecuted or what, if any, penalty will be imposed.)
Gender-Neutral Statutes	Traditionally, the law defined rape as a crime only men could commit. Thus, only husbands were granted the "immunity" or protection of the marital rape exemption. Today, many states have rewritten their laws in gender-neutral terms. Under these new rape laws, women can also be prosecuted for rape and the immunity granted under the marital rape exemption is extended to both spouses. The following chart does not incorporate these gender-neutral changes since it is intended to reflect reality rather than pure "legalese."

These categories are general, and states may fall into more than one category. In addition, considerable legislation and litigation has been occurring over the last two years, and therefore the following chart only reflects the law as of July 1, 1981.

STATE	CATEGORY	STATUS OF MARITAL RAPE LAW	CITATIONS*
Alabama	*1, 3*	Husbands and cohabitors can *never* be charged with rape of mate.	Title 13A-6-60(4), 13A-6-61
Alaska	*2*	Husband can only be charged with rape of wife if parties were living apart *or* he caused	Stat § 11.41.445(a)

*The citations are included so interested readers can more easily obtain full details of these laws.

STATE	CATEGORY	STATUS OF MARITAL RAPE LAW	CITATIONS*
		severe physical injury (besides the rape).	
Arizona	*2*	Husband cannot be charged with wife rape while parties are living together.	R.S. § 13-1404-06
Arkansas	*5*	Statute only exempts husbands in statutory rape cases. Whether marital rape is a crime will depend on judicial decision or legislative interpretation of "common law" exemption.	Stat. § 41-1803, *et seq.*
California	*No Exemption*	Husband can be charged with crime of "spousal rape." Thirty-day reporting requirement.	Pen. C. § 262
Colorado	*2*	Husband cannot be charged with rape of wife while parties live together.	R.S. § 18-3-409
Connecticut	*No Exemption to First-Degree Rape; 1, 3*	Spouse/cohabitors *can* be charged with first degree rape; marital and cohabitor exemption for all other sexual assaults.	Pen. Code § 532-67(b), as amended by H.B. 5247
Delaware	*3, 4*	"Voluntary social companion" of victim cannot be charged with first degree rape; this may exempt husbands, cohabitors and "dates." Cohabitors (and spouses living together) cannot be charged with rape of mate.	D.C.A. §§ 761-764, 772(b)
District of Columbia	*5*	Not known if "common law" exemption applies, making marital rape legal.	R.S.D.C. § 22-2801
Florida	*No Exemption*	Husbands can be charged with rape of wife, the same as a stranger. (*State v. Larry Smith*)	S.A. § 794.011
Georgia	*5*	Statute only exempts husbands in statutory rape cases. Marital rape *may* be legal under "common law" exemption; will	C.A. § 26.2001, 2018

*The citations are included so interested readers can more easily obtain full details of these laws.

STATE	CATEGORY	STATUS OF MARITAL RAPE LAW	CITATIONS*
		depend on judicial decision or legislative interpretation of statute.	
Hawaii	*4, 2*	"Voluntary social companion" of victim cannot be charged with forcible (first degree) rape; this may exempt husbands, cohabitors and "dates." Husbands cannot be charged with "lesser" sexual assaults of wife while parties are living together.	R.S. § 707-730 to 732
Idaho	*2*	Husband cannot be charged with rape of wife *unless* parties have been living apart at least 180 days or legal action for divorce or separation started (petition filed).	C. § 18-6107
Illinois	*1*	Husband can *never* be charged with rape of wife.	A.S. Ch. 38 § 11-1
Indiana	*2*	Husbands cannot be charged with rape of wife *unless* parties live apart and court action for separation or divorce started (petition filed).	S.A. § 35-42-4-1(b)
Iowa	*No Exemption to First- and Second-Degree Rape; 3*	Husbands *can* be charged with first and second degree rape of wife. Husbands and cohabitors *cannot* be charged with third degree sexual abuse of mate.	C.A. § 709.2 to 709.4
Kansas	*1*	Husband can *never* be charged with rape of wife.	S.A. § 21-3502
Kentucky	*2*	Husbands and cohabitors cannot be charged with rape of spouse *unless* court order of separation.	R.S. § 510.010 (3)
Louisiana	*2*	Husband cannot be charged with rape of wife *unless* court order of separation.	R.S.A. § 14.41

*The citations are included so interested readers can more easily obtain full details of these laws.

STATE	CATEGORY	STATUS OF MARITAL RAPE LAW	CITATIONS*
Maine	*2, 3*	Husbands and cohabitants cannot be charged with rape of mate while parties living together.	R.S.A. Title 17A § 251, 252
Maryland	*2*	Husband cannot be charged with rape of wife *unless* court order of separation.	A.C. § 27-464D
[illegible]	*No Exemptions*	Husbands can be charged with rape of wife same as a stranger (no exemption). (*Commonwealth v. Chretien*)	A.L. Ch. 265 § 22; Ch. 277 § 39
Michigan	*2*	Husbands cannot be charged with rape of wife *unless* parties live apart and court action for separation or divorce started (petition filed).	M.S.R.C.C. Ch. 23 § 2340
[illegible]	*No Exemption*	Husbands can be charged with rape of wife under most circumstances.	S.A. § 609.349
Mississippi	*2, 5*	Husband cannot be charged with "sexual battery" of wife *unless* parties living apart. Separate "rape" statute does *not* exempt husbands; unknown if marital *rape* is a crime.	MCA § 97-3-95 to 103, (Supp. 1980)
Missouri	*2*	Husband cannot be charged with rape of wife *unless* court order of separation.	A.S. § 566.010:2
Montana	*2, 3*	Husbands/cohabitants cannot be charged with rape of mate while parties are living together.	R.C. § 45-5-506
[illegible]	*No Exemption*	Husband can be charged with rape of wife the same as a stranger.	R.S. § 28-319, 320
Nevada	*2*	Husbands cannot be charged with rape of wife *unless* parties live apart and court action for separation or divorce started (petition filed).	R.S. § 200.373

*The citations are included so interested readers can more easily obtain full details of these laws.

STATE	CATEGORY	STATUS OF MARITAL RAPE LAW	CITATIONS*
New Hampshire	*No Exemption*	Husband *can* be charged with rape of wife under most circumstances.	RSA 632-A:5 (H.B. 516, effective 8/81)
New Jersey	*No Exemption*	Husbands *can* be charged with rape of wife, same as a stranger (no exemption).	S.A. § 2C:14-5(b)
New Mexico	*2, 3*	Husbands/cohabitants cannot be charged with rape of their mates *unless* parties living apart or legal action for divorce or separation started (petition filed).	Stat. § 30-9-10, 11
New York	*2*	Husband cannot be charged with rape of *wife unless* court order of separation.	Pen. L. § 130.00
North Carolina	*2*	Husband cannot be charged with rape of *wife unless* court order of separation or spouses living apart pursuant to written agreement.	G.S. § 14-27.8
North Dakota	*2*	Husbands cannot be charged with rape of *wife unless* court order of separation.	C.A. § 12.1-20-01, 02, 03
Ohio	*2*	Husband cannot be charged with rape of *wife unless* parties live apart and court action started (petition filed) or written separation agreement entered into.	ORC § 2907.01, 02
Oklahoma	*1*	Husband can *never* be charged with rape of wife.	S.A. Title 21 § 1111
Oregon	*No Exemption*	Husbands can be charged with rape of wife same as a stranger.	R.S. § 163.305
Pennsylvania	*2, 3*	Husbands/cohabitants cannot be charged with rape of mates *unless* parties living apart or written separation agreement entered into.	S.A. Title 18 § 3103

*The citations are included so interested readers can more easily obtain full details of these laws.

STATE	CATEGORY	STATUS OF MARITAL RAPE LAW	CITATIONS*
Rhode Island	*2*	Husband cannot be charged with rape of wife *unless* court order of separation.	G.L. § 11-37-1
South Carolina	*2*	Husband cannot be charged with rape of wife *unless* court order of separation.	C. § 16-3-658
South Dakota	*1*	Husband can *never* be charged with rape of wife.	C.L.A. § 22-22-1
Tennessee	*2*	Husband cannot be charged with rape *unless* court action for divorce or separation started (petition filed).	C.A. § 39-3702
Texas	*1, 3*	Husbands and cohabitor can *never* be charged with rape of wife/mate.	§ 21-02(a) § 21-12
Utah	*2*	Husband cannot be charged with rape of wife *unless* court order of separation.	Crim. C.A. § 76-5-402, 407
Vermont	*1*	Husband can *never* be charged with rape of wife.	S.A. Title 13 § 3252
Virginia	*5*	Unknown if marital rape is a crime.	Code 18.2-61, *et seq.* (effective 7/1/81)
Washington	*1*	Husband can *never* be charged with rape of wife.	R.C.A. Ch. 9A.44.010, *et seq.* (Supp., 1979)
West Virginia	*1, 3, 4*	Husbands and cohabitants can *never* be charged with rape of mate. "Voluntary social companion" cannot be charged with 1st degree sexual assault (date-rape exemption).	Code § 61-8B-1
Wisconsin	*2*	Husband cannot be charged with rape of wife *unless* parties live apart and court action for divorce or separation started (petition filed).	S.A. § 940.225(6)
Wyoming	*2*	Husband cannot be charged with rape of wife *unless* court order of separation.	S.A. § 6-4-307

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National Center on Women & Family Law

799 Broadway, Room 402 • New York, New York 10003 • (212) 674-8200

MARITAL RAPE EXEMPTION

The National Center on Women and Family Law, Inc. collects information on the marital rape exemption in state criminal statutes. The following chart outlines current statutory law. The categories are general and cursory, and states may fall into more than one category. We have tried to give general breakdowns of where each state stands on this issue. Since this issue is in a state of flux, this chart may be outdated in some instances. If any of our information is inaccurate, please advise us.

CURRENT STATUTORY LAW

As of January, 1984, at least 28 states bar prosecution of a husband for rape of his wife if they are living together. 12 states additionally bar unmarried cohabitants from being charged with rape of the women with whom they live* 18 states have abolished the exemption and permit prosecution of husbands who rape their wives under all or most circumstances.**

-- 5 states: bar husbands from being charged with rape of their wives, and no exception is made even where separation agreements or interlocutory decrees exist (i.e., there must be a final decree of divorce):

*Alabama - Title 13A-6-60-(4), 13A-6-61 (1978)

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*See Expansion Section, infra.

**California, Connecticut, Delaware, Florida, Hawaii, Iowa, Kansas, Massachusetts, Minnesota, Nebraska, New Hampshire. New Jersey, North Dakota, Oregon, Virginia, Washington, Wisconsin, Wyoming.

*North Dakota - Code Ann. §§12.01-20-01, 12.01-20-02 (1983). (orders of protection included. Exemption eliminated in first degree rape, §12-1-20-03, "Gross Sexual Imposition.")

Rhode Island - Gen. Law §§11-37-1, 11-37-2.1 (amended 1982) (Note: Exemption eliminated in first degree sexual assault if the parties have been living apart for more than 90 days or pursuant to a court order, and the assault is reported to the police within 24 hours.)

South Carolina - Code §16-3-658 (1977)

Utah - Crim. Code Ann. §§76-6-402, 76-6-407 (1979)

-- 6 states: marital exemption ends if parties are living apart AND one spouse has filed a petition for annulment, divorce, separation or separate maintenance:

Indiana - Stat. Ann.. §35-42-4-1-(b) (amended 1983) (or a petition for a protective order has been filed)

Michigan - Second Rev. Crim. Code, Ch. 23, §2340 (1980)

Nevada - Rev. Stat. §200.373 (1977)

Ohio - Rev. Code §§2907.01(L), 2907.02 (or if parties have entered into a written settlement agreement)

Rhode Island - Gen. Laws §§11-37-1, 11-37-2.1 (amended 1982) (Note: exemption eliminated in first degree sexual assault if the parties have been living apart for more than 90 days or pursuant to a court order, and the assault is reported to the police within 24 hours.)

Tennessee - Code Ann. §39-2-610 (1979)

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**California, Connecticut, Delaware, Florida, Hawaii, Iowa, Kansas, Massachusetts, Minnesota, Nebraska, New Hampshire. New Jersey, North Dakota, Oregon, Virginia, Washington, Wisconsin, Wyoming.

*Illinois - Rev. Stat. 1983 Supp., Ch. 38, §12-18(c). Exemption abolished in "aggravated criminal sexual assault" if the assault is reported in 30 days. (R.S.A. §12-14, effective 7/1/84).

South Dakota - Compiled Laws Ann. §22-22-1 (1979) (Note: South Dakota amended its statute to eliminate the marital rape rape exemption, but the following year repealed that amendment.)

Vermont - Stat. Ann., Title 13 §3252 (effective 7/1/77)

*West Virginia - W. Va. Code §61-8B-1 (1977)

--10 states: marital rape exemption ends when parties are separated under a court order:

*Kentucky - Rev. Stat. §510.010(3) (1975)

Louisiana - Rev. Stat. Ann. §14.41 (1978) (Note: 1984 amendment abolished exemption in "aggravated sexual battery" only, §14:43.2.)

Maryland - Ann. Code §27-464D (1979)

Missouri - Ann. Stat. §566.010:2 (1979).

New York - N.Y. Pen. Law §130.00 (1983) (Note: Exemption also ends if orders of protection exist, or parties have entered into a separation agreement which includes an express provision that husband will be criminally liable for raping his wife.)

North Carolina - Gen. Stat. §14-27.8 (1979) (or living apart pursuant to a written separation agreement)

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*See Expansion Section, infra.

*North Dakota - Code Ann. §§12.01-20-01, 12.01-20-02 (1983). (orders of protection included. Exemption eliminated in first degree rape, §12-1-20-03, "Gross Sexual Imposition.")

Rhode Island - Gen. Law §§11-37-1, 11-37-2.1 (amended 1982) (Note: Exemption eliminated in first degree sexual assault if the parties have been living apart for more than 90 days or pursuant to a court order, and the assault is reported to the police within 24 hours.)

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Utah - Crim. Code Ann. §§76-6-402, 76-6-407 (1979)

-- 6 states: marital exemption ends if parties are living apart AND one spouse has filed a petition for annulment, divorce, separation or separate maintenance:

Indiana - Stat. Ann.. §35-42-4-1-(b) (amended 1983) (or a petition for a protective order has been filed)

Michigan - Second Rev. Crim. Code, Ch. 23, §2340 (1980)

Nevada - Rev. Stat. §200.373 (1977)

Ohio - Rev. Code §§2907.01(L), 2907.02 (or if parties have entered into a written settlement agreement)

Rhode Island - Gen. Laws §§11-37-1, 11-37-2.1 (amended 1982) (Note: exemption eliminated in first degree sexual assault if the parties have been living apart for more than 90 days or pursuant to a court order, and the assault is reported to the police within 24 hours.)

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*See Expansion Section, infra

-- 4 states: marital exemption ends if parties are living apart OR one spouse has initiated legal proceedings:

Idaho - Code §18-6107 (1977) (parties must be living apart at least 180 days)

New Mexico - Stat. §30-9-10 (1978)

Oklahoma - Stat. Ann. Title 21 §1111(B) (amended by Sec. 1, Ch. 41, O.S.L. 1983; effective 11/1/84). (orders of protection included)

Texas - Pen. Code §22.011(c) (amended 1983)

--12 states: marital exemption ends when parties are living apart (no court order or separation agreement needed):

Alaska - Stat. §11-41.445(a) (effective 1, 80) (marriage is an affirmative defen except where parties are living ap or defendant caused serious physic injury)

Arizona - Rev. Stat. §§13-1401.4, 13-1404 to 13-1406 (1978)

Colorado - Rev. Stat. §18-3-409 (1975)

Idaho - Code §18-6107 (1977) (parties must be living apart at least 180 days)

Iowa - Code Ann. §§709.2, 709.3, 709.4 (1978)

*Maine - Rev. Stat. Ann. Title 17A §§11-251, 11-252 (1979)

Mississippi - Code Ann. 97-3-95 (1981) (Sexual Battery)

*Montana - Rev. Code §45-5-506 (1979)

New Mexico - Stat. Ann. §§30-9-10E, 30-9-11 (1978)

Oklahoma - Stat. Ann. Title 21 §1111(B) (amended by Sec. 1, Ch. 41, O.S.L. 1983; effective 11/1/84) (orders of protection included)

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*See Expansion Section, infra

*Pennsylvania - Stat. Ann. Title 18 §3103 (1977) (Note: no exemption if parties have entered into written separation agreement, even if they are still living together.)

Texas - Pen. Code §22.011(c) (amended 1983)

-- 4 states: have no express marital rape exemption in their statutes (are "silent"). Whether the alleged "common law" exemption barring prosecution is applied depends upon judicial decision and/or legislative intent. See LITIGATION Section.

Arkansas - Stat. §§41-1801, 41-1803 (1976) (Note: Express exemption in statutory rape, §§41-1804 to 1810)

Georgia - Code Ann. §26-2001 (amended 1978) (Note: Express exemption in statutory rape, §26-2018)

Mississippi - Code Ann. §97-3-65(2) (1979) (Rape statute silent; compare with express exemption in "sexual battery" statute, §97-3-99)

Washington, D.C. - R.S.D.C. §22-2801 (1967) (Note: Letter from Office of D.C. Corp. Counsel dated 6/4/84, stating that cases "involving marital rape" are prosecuted. On file with NCOWFL.)

STATES WHICH HAVE STATUTORILY LIMITED OR STRICKEN THE MARITAL RAPE EXEMPTION

--8 states: abolished the marital rape exemption altogether. Rape by a spouse is treated the same as rape by a stranger.

Florida - Stat. Ann. §794-011 (1979). No express exemption; spouses can be charged the same as strangers, State v. Larry Smith, 401 So.2d 1126 (5th DCA 1981), and People v. Rider, 9 FLW 887 (3d DCA 1984). (See LITIGATION Section)

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*See Expansion Section, infra

Kansas - Stat Ann. §§21-3501, 21-3502, effective L. 1983 (HB 2008, Ch. 109), deleting the marital rape exemption as it applies to the crime of rape.

However, a spousal exemption remains applicable to crime of indecent liberties with a child under sixteen, K.S.A. §21-3503. This exemption ends if the parties are living apart or either spouse has filed for annulment, separate maintenance, divorce or an order of protection.

Massachusetts - Ann. Laws. Ch. 265 §22, Ch. 277 §39 (1979). No exemption; spouses can be charged the same as strangers. Commonwealth v. Chretien, 417 N.E.2d 1203 (1981). (See LITIGATION Section).

New Jersey - Stat. Ann §2C:14-5(b), effective 9/1/79. This state has affirmatively abrogated the alleged "common law" exemption:

→ "No actor shall be presumed to be incapable of committing a crime under this Chapter [Sexual Offenses] because of age or impotency or marriage to the victim." N.J.S.A. §2C:14-5(b), emphasis added.

Nebraska - Rev. Stat. §§28-319, 28-320, effective 1/1/76 (repealing and replacing §28-403.03 and §28-403.04 which included the exemption.)

Oregon - Rev. Stat. §163.305 (amended by 1977 C. 844, deleting the marital rape exemption.)

Virginia - Va. Code. §18.2-61 (1981 amendments). No express exemption; no "common law" exemption pursuant to Weishaupt v. Commonwealth of Virginia, Va. Supreme Ct., Slip. Op. 830616 (decided April 27, 1984). (See LITIGATION Section)

Wisconsin - Stat. Ann. §940.225(6), effective 5/1/82. Wisconsin followed New Jersey's example by expressly and affirmatively abrogating the exemption (rather than merely deleting the exemption as in Oregon). This method is preferrable because it does not leave open to question (and litigation) whether the so-called "common law exemption" (Hale's Doctrine) applies once the statute becomes "silent."

--8 states: have partially striken, or limited, the marital rape exemption so that rape by a spouse is a crime under most circumstances:

California - Pen. Code §262, effective 1/1/80. Establishes a separate crime of spousal rape. However, the marital exemption is still applicable where the victim is "incapable" of giving legal consent (i.e., mentally or physically handicappped; intoxicated or drugged, even when the victim's state is due to acts of the defendant; unconscious of the nature of the act). Effective 9/28/83, the thirty (30) day reporting requirement extended to 90 days (the victim must report the rape to the police or district attorney within this time period).

Connecticut - Pen. Code 53A-67(b), effective 10/1/81 (HB 5247). Marital and cohabitant exemption deleted from first-degree forcible rape. Exemption remains as an affirmative defense to lesser degrees of rape and sexual assault.

*Delaware - exemption deleted from first and second degree rape (D.C.A. §§763, 764). However, D.C.A. §764 (first degree rape) includes a "voluntary social companion" exemption which may operate to exempt spouses and cohabitors.

Exemption remains in Sexual Assault (D.C.A. §761, Class A Misdemeanor) and Sexual Misconduct (D.C. .762, Class E Felony). Additionally, the exemption, where applicable, is expanded to cover unmarried cohabitants. D.C.A. §772(b).

*Hawaii - Rev. Stat. §§707-730, 707-731, 707-732, effective 6/21/79. By amending statutes to gender-neutral terms, marital rape exemptions were deleted.

However, "voluntary social companion" exemption in §707-730 (first degree rape) may operate to exempt spouses and cohabitors. This section, as amended in 1981, reduced the period relating to previous sexual intercourse with a "social companion" from one year to thirty days.

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*See Expansion Section, infra

Iowa - Code Ann. §§709.2-709.4. No exemption in first and second degree sexual abuse; exemption remains in third degree sexual abuse.

*Minnesota - Stat. Ann §609.349, amended 1980. Expressly deletes marital rape exemption in most cases: "Nothing in this section shall be construed to prohibit or restrain the prosecution for any other offense committed by any person against his legal spouse."

However, exemption (which includes cohabitants) still applies in statutory rape, and cases where the victim is mentally or physically disabled.

New Hampshire - Rev. Stat. Ann. §632-A:5 (amended by HB 516, effective September 1981). Exemption deleted, except in statutory rape cases, or cases involving "mentally defective" victim-wives. (R.S.A. §632-A:2 and :3).

*North Dakota - Code Ann. §12.01-20-01, 12.01-20-02, effective 7/1/83 (SB 2249). Exemption deleted from first degree rape (§12.1-20-03:3, "Gross Sexual Imposition"). However, "voluntary social companion" exemption may operate to exempt spouses and cohabitants. Exemption remains in all lesser offenses.

Washington - Rev. Code Ann. Ch. 9A.44.010, 9A.44.040, 9A.44.050, 9A.44.060 (amended in 1983). Exemption abolished in first and second degree rape, but remains in third degree rape.

Wyoming - Stat. §6-2-307 (1983). Exemption abolished in first and second degree sexual assault (§§6-2-301, 302). Exemption remains in third and fourth degrees (§§6-2-304, 305).

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*See Expansion Section, infra

EXPANSION OF THE MARITAL RAPE EXEMPTION

--12 states have expanded this marital "privilege" or "right" of rape to unmarried cohabitants, (hereinafter referred to as "cohabitors"), e.g., "the exclusion shall be deemed to extend to persons living as man and wife, regardless of the legal status of their relationship." Rev. Code of Montana, §45-5-5-6(2).

Additionally, 5 states* have also provided a partial exemption to "voluntary social companions" (thereby, to an extent, legalizing "date rape"):

Alabama - Crim. Code §13A-6-60(4) (exemption extends to cohabitors).

Connecticut - Pen. Code §53a-67(b) (cohabitation is an affirmative defense, except to first degree rape).

*Delaware - Code Ann. §772(b) (exemption for cohabitors in sexual assault and sexual misconduct); and Code Ann. §764(2) (exemption in first degree rape where defendant was victim's "voluntary social companion" on the occasion of the crime and victim had previously permitted him sexual contact, OR defendant caused serious physical, mental or emotional injury).

*Hawaii - Rev. Stat. §707-730(1)(a)(i). Exemption in first degree rape where victim was defendant's "voluntary social companion who had within the previous thirty days permitted him sexual intercourse; "voluntary social companion" exemption does not apply if defendant inflicts "serious bodily injury." No exemption in second or third degree rape.

Iowa - Code Ann. §709.4 (cohabitors exemption in third degree Sexual Abuse; no exemption in first and second degree Sexual Abuse).

Kentucky - Rev. Stat. Ann. §510.010(3) (exemption extended to cohabitors; marriage defined as "persons living together as man and wife regardless of the legal status of their relationship.")

*Maine - Rev. Stat. Ann. Title 17-A §252.2 (cohabitation as an affirmative defense) and §252.3 ("voluntary social companion" defense to prosecution for Rape as Class A crime; exemption reduces to Class B crime).

Minnesota - Stat. Ann. §609.342 (1979) (exemption for cohabitors in statutory rape, and cases where victim is mentally or physically disabled).

Montana - Rev. Code §45-5-506 (exemption extended to cohabitors).

*North Dakota - Code Ann. §12.01-20-03:3 ("voluntary social companion" exemption to Class A Felony of "Gross Sexual Imposition" reducing crime to Class B Felony. Exemption applies if victim has "at any time previously" permitted defendant "sexual liberties".)

Pennsylvania - Stat. Ann., Title 18 §3103 (exemption extended to cohabitors).

*West Virginia - W. Va. Code §61-8B-1(2) (cohabitor exemption; marriage defined as including "persons living together as man and wife regardless of the legal status of their relationship"), and §61-8B-3(a)(iii), "voluntary social companion" exemption to first degree Sexual Assault.

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MARITAL RAPE FACT SHEET*

1. *Fact or Fiction?* "MARITAL RAPE ISN'T AS SERIOUS AS RAPE BY A STRANGER--IT'S JUST A WOMAN NOT BEING IN THE MOOD AND HER HUSBAND INSISTING."

   As a matter of fact, marital rape is often just as violent, just as degrading, and oftentimes more traumatic than rape by a stranger. It is perpetrated with knives, at gunpoint, repeatedly, brutally, in front of others, and most often is the final violent act culminating a series of physical abuses. One woman has reported being beaten and raped by her husband virtually every day for six months, anally raped 9 or 10 times. He told her that, if she ever tried to leave, he would kill her. In terror she fled to another state, changed her name, and lived there for a year in cognito.

2. *Fact or Fiction?* "MARITAL RAPE ISN'T OFFENSIVE--AFTER ALL, A WIFE HAS HAD SEX WITH HER HUSBAND BEFORE, WHAT'S ONE MORE TIME?"

   As a matter of fact, a woman raped by a stranger has to live with the memory of that experience. A woman raped by her husband has to live with her rapist. Many wife victims, trapped in a reign of terror, experience repeated sexual assaults over a number of years. What happens to a capacity for intimacy when the person who has promised to love and protect, and on whom one may be economically dependent, commits such a brutal and violent violation?

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* Prepared and distributed by the Pennsylvania Commission on the Status of Women.

(over)

3. *Fact or Fiction?* "MARITAL RAPE IS A BIZARRE AND UNUSUAL ACT AND DOESN'T NEED LEGISLATIVE ACTION."

As a matter of fact, most experts consider rape to be the most underreported of all crimes and marital rape even more so. Over a third of women who appear at battered women's shelters report being sexually assaulted by their husbands. It is seldom discussed. Humiliated and ashamed, marital rape victims don't talk about it. They don't report it because the law does not help them.

4. *Fact or Fiction?* "WHEN A WOMAN MARRIES, SHE CONSENTS TO SEXUAL INTERCOURSE WITH HER HUSBAND."

As a matter of fact, sexual expression in love is one thing. Forced, brutalized sex is another. No one consents to violence by marrying. Under current law prosecution is impossible for even the most brutal rapes in marriage.

5. *Fact or Fiction?* "IF PROSECUTIONS ARE ALLOWED FOR MARITAL RAPE, A LOT OF INNOCENT HUSBANDS WILL HAVE RAPE CHARGES FILED AGAINST THEM BY ANGRY, VENGEFUL WIVES WHO HOPE TO BARGAIN FOR A BETTER PROPERTY SETTLEMENT IN A DIVORCE ACTION."

As a matter of fact, this myth is built on the ill-founded belief that women are innately vengeful and willing to go through the tortures of a courtroom trial in order to "get back" at a man, and that somehow women should be treated as less credible victims of crime than others. Actually, there are many other types of complaints which a woman could file for retaliation that would require less public self-exposure and trauma. Further, our legal system has built in mechanisms to determine the merits of a complaint. Police investigations, prosecutor discretion, and jury deliberations are employed to determine the truth or falsity of other allegations. Why should marital rape be treated any differently? Finally, no such misuse has been documented by the states that have eliminated immunity of spouses from prosecution for rape. Only the most extremely brutal and horrifying incidents of marital rape have been reported.

6. *Fact or Fiction?* "MARITAL RAPE IS SIMPLY ONE SPOUSE'S WORD AGAINST THE OTHER, HENCE IT WILL BE DIFFICULT TO PROSECUTE."

As a matter of fact, when has difficulty to prosecute determined what a crime is? Treason, conspiracy, child abuse, and incest are difficult to prove, but there is no outcry to decriminalize them.

7. *Fact or Fiction?* "THERE ALREADY EXIST REMEDIES FOR MARITAL RAPE--A WOMAN CAN FILE ASSAULT CHARGES OR GET A DIVORCE."

As a matter of fact, all rapists assault their victims. Rape is a crime different from assault. That is why special rape laws exist. Rape involves a special humiliation and special violation. Assault is a less serious crime, its penalty less a deterrent. Even though a woman might escape as a victim by filing for divorce, should the committer of the criminal acts escape punishment for them? An appropriate deterrent to this type of violent behavior is not now available.

8. *Fact or Fiction?* "MARITAL RAPE LAWS WOULD HAVE THE STATE MEDDLING IN PEOPLE'S BEDROOM AFFAIRS."

As a matter of fact, the state is meddling in the bedroom whether there is a marital rape law or not. In one case the state allows husbands to rape their wives. In the other, the state protects wives from this type of violence. Should murder and assault between spouses be decriminalized just because it's a family affair? A husband should no more fear criminalization of marital rape than a parent fears laws on incest or child abuse. The law should condemn a brutal, hostile, revengeful, hateful, and anti-social act whether it happens within a marriage or without.

(over)

9. *Fact or Fiction?* "MARITAL RAPE LAWS WILL DESTROY MARRIAGES BY PREVENTING ANY POSSIBLE RECONCILIATION."

As a matter of fact, isn't a marriage in which a husband rapes his wife and she presses charges already destroyed? Withholding justice and equal protection to try to hold together such a marriage is an unrealistic and improper goal for the criminal law. The law now protects a raping husband rather than a victim wife, and women can be coerced into staying in violent marriages. Should the law encourage such forced cohabitation?

10. *Fact or Fiction?* "SINCE SO FEW CASES ARE BROUGHT TO TRIAL, WHY BOTHER WITH A MARITAL RAPE LAW?"

As a matter of fact, the law protects either the victim or the rapist. Husbands who commit acts of violence against wives now receive special protection from the law in Pennsylvania. Should such special protection more rightly belong with the victim? Passage of H.B. 1122 would call attention to the problem, let the victims know there can be help, and, by removing society's sanction for such behavior, work to deter it.

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CAN THERE BE RAPE IN MARRIAGE

SOME FACTS AND FICTIONS ABOUT MARITAL RAPE

1. *Fact or Fiction? "MARITAL RAPE ISN'T AS SERIOUS AS RAPE BY A STRANGER -- IT'S JUST A WOMAN NOT BEING IN THE MOOD AND HER HUSBAND INSISTING."*

As a matter of fact, marital rape is often just as violent, just as degrading, and oftentimes more traumatic than rape by a stranger. It is perpetrated with knives, at gunpoint, repeatedly, brutally, in front of others, and most often is the final violent act culminating a series of physical abuses. One women has reported being beaten and raped by her husband virtually every day for six months, anally raped 9 or 10 times. He told her that, if she ever tried to leave, he would kill her. In terror she fled to another state, changed her name, and lived there for a year in cognito.

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As a matter of fact, a woman raped by a stranger has to live with the memory of that experience. A woman raped by her husband has to live with her rapist. Many wife victims, trapped in a reign of terror, experience repeated sexual assaults over a number of years. What happens to a capacity for intimacy [illegible] to love and protect, and on whom one may be economically dependent, commits such a brutal and violent violation?

3. *Fact or Fiction? "MARITAL RAPE IS A BIZARRE AND UNUSUAL ACT AND DOESN'T NEED LEGISLATIVE ACTION."*

As a matter of fact, most experts consider rape to be the most under-reported of all crimes and marital rape even more so. Over a third of women who appear at battered women's shelters report being sexually assaulted by their husbands. It is seldom discussed. Humiliated and ashamed, marital rape victims don't talk about it. They don't report it because the law does not help them.

4. *Fact or Fiction? "WHEN A WOMAN MARRIES, SHE CONSENTS TO SEXUAL INTERCOURSE WITH HER HUSBAND."*

As a matter of fact, sexual expression in love is one thing. Forced, brutalized sex is another. No one consents to violence by marrying. Under current law prosecution is impossible for even the most brutal rapes in marriage.

5. *Fact or Fiction? "IF PROSECUTIONS ARE ALLOWED FOR MARITAL RAPE, A LOT OF INNOCENT HUSBANDS WILL HAVE RAPE CHARGES FILED AGAINST THEM BY ANGRY, VENGEFUL WIVES WHO HOPE TO BARGAIN FOR A BETTER PROPERTY SETTLEMENT IN A DIVORCE ACTION."*

As a matter of fact, this myth is built on the ill-founded belief that women are innately vengeful and willing to go through the tortures of a court-room trial in order to "get back" at a man, and that somehow women should be treated as less credible victims of crime than others. Actually, there are many other types of compliants which a woman could file for retaliation that would require less public self-exposure and trauma. Further, our legal system has built in mechanisms to determine the merits of a complaint. Police investigations, prosecutor discretion, and jury deliberations are employed to determine the truth or falsity of other allegations. Why should marital rape be treated any differently? Finally, no such misuse has been documented by the states that have eliminated immunity of spouses from prosecution for rape. Only the most extremely brutal and horrifying incidents of marital rape have been reported.

6. *Fact or Fiction? "MARITAL RAPE IS SIMPLY ONE SPOUSE'S WORD AGAINST THE OTHER. HENCE IT WILL BE DIFFICULT TO PROSECUTE."*

As a matter of fact, when has difficulty to prosecute determined what a crime is? Treason, conspiracy, child abuse, and incest are difficult to prove, but there is no outcry to decriminalize them.

marital rape

MA4

June, 1984

THE PROSECUTION OF MARITAL RAPE:

THE CALIFORNIA EXPERIENCE *1

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Carol Richards brought these articles back from a conference she attended. I thought these were the best of the lot

Barbara Nikolis

In the debate over removing the spousal exemption to rape, much concern has been expressed over how or even whether a law criminalizing rape would work.(*2) Opponents of the change have raised several different spectors of insidious consequences that would ensue if marital rape is criminalized For example, they have warned that deleting the spousal exemption would risk flooding the criminal justice system with frivolous complaints brought by "vindictive" wives.(*3) They have also raised the fear that cases brought under such a law would be impossible to prosecute, either because wives would be unreliable witnesses or because the cases would boil down to her word against his.(*4) In short, they have predicted that marital assault prosecutions would bog down and frustrate the criminal justice system.

Until recently, arguments over these claims have been mostly hypothetical. There has been little empirical evidence against which to judge them. However, now that several states have eliminated the spousal exemption, and have gained experience about what happens once the exemption is removed, it is possible to see how a spousal rape law works in actuality.

A state well situated for a study of the effects of criminalizing marital rape is California. California changed its law as early as January, 1980, and has had a total of more than four years experience without the spousal exemption. As the most populous state in the country, California has also generated a large number and variety of spousal rape cases. Moreover, since the change of the law was hotly debated and widely publicized in California, public attention to marital rape cases has been relatively high there, making information on the subject easier to collect.

On the other hand, using California to study the operation of marital rape prosecutions has some drawbacks. California's legal situation with regard to marital rape is not entirely parallel to that of other states which have criminalized rape between a husband and a wife who are still living together. When California changed the law on spousal rape, the legislators did not merely delete the spousal exemption. Instead, they drafted a totally new section of the criminal code on the matter of spousal rape. One important special condition attached to the California spousal rape law is that victims were limited (until recently) to bringing such charges within 30 days of their occurrence. Another is that marital rape, unlike non-marital rape, can be a misdemeanor rather than a felony. Nonetheless, a great deal of valuable insight into the question of whether marital rape is a viable legal concept can be gleaned by looking at the situation in California.

GATHERING DATA

Gathering the needed data on the operation of the marital rape law in California has not been a simple task. Unfortunately, the state Bureau of Criminal Statistics does not keep very thorough or very detailed information on marital rape prosecutions in spite of the fact that an important public policy issue is at stake.(*5)

So the staff of the National Clearinghouse on Marital Rape (NCMR) has been forced to compile data on its own — a frustrating and cumbersome task. Marital rape cases have been identified in a variety of ways — but primarily through a newspaper clipping service. The staff of the Clearinghouse, after hearing about a marital rape prosecution, made contacts with the journalists, attorneys, prosecutors, court officials, probation officers and sometimes rape crisis

workers familiar with the case, in an effort to get as much detail as possible about the events of the case, the backgrounds of the offender and the victim, and the disposition of the case within the legal system. District attorneys were generally the best and most reliable sources of information. Occasionally, these officials referred NCMR staff to other cases which had not been identified through the news clipping service.

Altogether, NCMR staff identified 39 cases of marital rape which came to the attention of the police or courts from January, 1980 through December, 1981. This is not necessarily a complete inventory of all such cases, however.

One piece of evidence suggests it is fairly thorough, though. The state Bureau of Criminal Statistics did compile what it believed to be a complete tally of all arrests for marital rape in 1980. This official tally showed 11 arrests. For the comparable time period, the NCMR inventory showed 17 cases that even the official reporting statistics did not pick up.

Nonetheless, it must be said that although NCMR believes it to be fairly complete, there is no way of knowing how totally complete the NCMR inventory of rape cases is. Moreover, without the information about its completeness, we cannot vouch for its representativeness either. There is every reason to believe that the cases not identified, if there were any, would be less sensational cases that did not proceed as far in the criminal justice system.

In other words, the cases that were identified would be more brutal, contain more evidence, and be more likely to result in a hearing or trial that would bring it to greater public attention than other cases. Whether this group of cases is biased in this way, we do not know.

With these possible caveats in mind, we present the information on the California cases. One advantage of generating data through calls to District Attorneys, newspapers and so forth, rather than through the state reporting system, was that a great deal more information could be gathered. The NCMR, by diligent sleuthing, was able to inform itself about age, race, occupations of the husband and wife, and the nature of the incident in addition to all the data about the court disposition.

NATURE OF THE CASES

A first thing to note about the cases is that they were, on the whole, extremely brutal. Especially brutal cases are probably more apt to end up on the police blotter and in the newspaper, and that may account in part for the array of incredible violence illustrated in the chart. The cases include one where a woman was raped with a crowbar and a sixteen inch tire iron and then had her breasts slashed with the same instruments. In another, a woman complained that her husband forced her to have sex with other men and dogs. In still another, the fugitive husband murdered the victim before he could be apprehended for her rape. The use of knives and guns was a common feature among these cases and several included very severe beatings.

A second important feature of the cases was that a majority of the rapes occurred between spouses who were separated, sometimes very recently so. In only 18 percent of the cases were the couple still living together (See Table 1). It is not surprising that cohabiting couples constitute a minority of cases. Wives who are still living with their husbands no doubt have a much more

difficult time seeing what happened to them as a rape and choosing to present such charges to the police. Also, a woman who is living in a separate household would expect less skepticism and ridicule on the part of police when she made such a charge. And it may be easier for such women to establish evidence of force and non-consent. As time goes on, normative standards change, and women become more aware of their rights, the proportion of cases involving cohabiting spouses may increase.

The deletion of the exemption for cohabiting spouses also has a "multiplier" effect, we suspect, on the prosecution of estranged husbands. When the exemption for cohabiting spouses is removed, there is generally a great deal of publicity about the problem. Prosecutors, police officers and women in general learn about the possibility of charging spouses with rape. This no doubt leads to an increased number of cases involving estranged husbands as well as cohabiting husbands.

Incidentally, there are some interesting similarities among the cases of women raped by estranged husbands. A number of them were kidnapped before they were raped, driven somewhere in a car against their will or taken somewhere at gunpoint. Others were deceived by husbands who told them they wanted to see them in order to talk with them about their children or about their finances.

THE OFFENDERS

The NCMR researchers were able to gather some valuable information about the offenders as well as about the court disposition (See Table 1). The offenders were, by and large, young. Sixty-four percent were under 30 and 33 percent under 25. This corresponds to what we found in our interview population of marital rape victims.([35]) Marital rape coming to public attention is predominantly a younger man's crime.

Occupationally, the offenders whose marital rapes come to public attention were also a lower status group. Large numbers, 31 percent, were unemployed, and another 31 percent were blue-collar workers. This may not tell us anything about marital rape in general, however. We have to remember that is it typically men from lower social classes who are the clientele of the criminal justice system. Well-to-do criminals tend to be more successful at evading detection and prosecution. Nonetheless, this inventory of cases shows that some middle-class marital rapists are being prosecuted. The law is being applied to a spectrum of husbands, not just one class.

The racial and ethnic breakdown of the offenders shows a distribution roughly typical of the California population as a whole. Of those whose race we could ascertain, about two-thirds were white and the remaining third divided between Black and Hispanic.

DISPOSITION OF CASES

The most interesting information we can glean from these cases is not so much about the phenomenon of marital rape itself but rather about how the phenomenon is handled in the criminal justice system. The cases are certainly not a representative set of marital rapes, the vast majority of which we know are never reported. But they are in all likelihood a representative sample of cases that make their way into the legal system. What happens to marital rape

cases once they arrive there? (See Table 2)

First of all, a substantial number of cases get dropped before they go very far, often before trial, and sometimes before arraignment. In 28 percent of the cases in this sample the charges were dropped.

Unfortunately, the information on why the charges were dropped is not among the most reliable in the chart. Many times the reason given depends on the perspective of the person giving the information. District attorneys often choose to drop charges because they think they do not have a good case but then blame it on lack of cooperation by the wife. From the wife's perspective, she may see the dropping of charges as the decision of the D.A. The real state of affairs is difficult to determine.

It is certain that in some cases charges are dropped at the request of the wife. Where NCMR researchers could ascertain the reasons the wife gave for such requests they included such things as: 1) the wife was pressured by relatives of the offender to drop the charge, 2) the wife did not want to face the embarrassment of a trial, 3) the wife forgave her husband and wanted him back or 4) the wife got what she most wanted (divorce and protection) in other ways.

Of course, another common reason for wives dropping charges, especially in wife abuse cases, is fear of further retaliation by the husband.

It does not appear from the available information that the cases where the charges were dropped were frivolous or fraudulent. Some of these dropped charges involved severe assaults, replete with injuries and witnesses. In fact, one involved the woman who was raped and battered with the tire iron.

The remaining cases (72 percent) went on for prosecution, and of these a remarkable 89 percent (25 out of 28) resulted in a conviction. There were several routes to a conviction. The most common was a simple guilty plea on the part of the offender: 60 percent (17 of 28) of the offenders pleaded guilty, usually to the charge of spousal rape itself. In a little less than a third of such pleas, though, the charge was bargained down to another charge, usually the less onerous one of assault or battery.

In 11 cases the offender pleaded not guilty and went to trial. Of these, eight resulted in a guilty verdict -- seven by a jury and one by a judge. There were three non-guilty verdicts handed down to marital rape charges, two by a jury and one by a judge. (Actually in the one jury acquittal, there were two jury trials: one ended in a deadlock, the other in an acquittal.)

SENTENCING

All together, 25 of the 28 cases brought to trial in the two year period resulted in a guilty finding, and all offenders received sentences of some sort. The sentences were not particularly severe. Ten of the convicted men received no jail term whatsoever. Most of these got off with suspended sentences and fines. Some were remanded to counseling and one was ordered to do community service.

Fifteen of the 25 did go to jail or prison, however, with sentences ranging from 30 days to 16 years. The severe sentences tended to be meted out only when other crimes had been committed in tandem with the marital rape. In the case

where one judge imposed a 16 year sentence, the offender had abducted and raped another unrelated woman during the same episode where the spousal rape had occurred. A man who held his son hostage with a sawed off shotgun was sentenced to four years. The longest sentence meted out for a marital rape uncomplicated by other crimes and weapon violations was three years. The maximum possible term for felony spousal rape is eight years.

IMPLICATIONS: NO FLOOD OF CASES

From an analysis of these 39 cases, it is possible to draw some important conclusions about how the criminal justice system deals with the issue of marital rape once it is criminalized. They are conclusions which contribute directly to the debate on policy which for the last few years has been taking place in legislatures and courts.

First, there is little evidence that the courts will be swamped by a large number of marital rape complaints. Thirty, forty or even fifty cases reaching the courts over a two-year period in a state of 30 million people is a miniscule burden on the system. In the case of California, the load works out, as far as we can tell, to be approximately one case per year per million inhabitants. At that rate, most states in the country can probably expect less than a dozen prosecutions per year following the criminalization of spousal rape. If we are talking about states where the exemption only applies to a husband and wife living together, the increase in cases will be even smaller.

As to the matter of these cases being non-serious, the opposite would appear to be true. If California's experience holds true elsewhere, the type of cases that will come to court will tend to be the most blatant, the most brutal and the most heinous.

Of course, these conclusions only apply to cases in the courts. Those opposed to criminalizing marital rape also are concerned about the police being inundated with a large number of frivolous complaints. From the data we have collected, we cannot draw any conclusions about the experience of the police. However, we are skeptical that the police experience in California has been much different.

IMPLICATION: DROPPING OF CHARGES

Clearly a large number of marital rape charges later get dropped. As in the case of wife abuse, where similarly large numbers of cases are dropped, there is controversy about why the attrition rate is so high. Police and prosecutors tend to blame the wives for being fickle. Advocates for battered women tend to blame the criminal justice system for being insensitive.

The key problem, however, is not in determining who is to blame but in improving the level of mutual cooperation between victims and the criminal justice system. Where special victim assistance programs have been set up around the country, for example, and where prosecutors have learned more about the dilemmas facing victims, this level of cooperation has increased.(*7)

If the cases noted here are any indication, women do not drop charges because they were trumped up in the first place. Rather, they retract these charges after having suffered from fear, from embarassment, or from pressure by

relatives. Sometimes sensitive and on-going personal contact between the prosecutor and the victim is enough to prevent case attrition. As prosecutors recognize marital rape as a legitimate crime and gain more experience with marital rape cases, we expect that their record will improve as they learn how best to work with victims to insure their participation.

IMPLICATION: HIGH CONVICTION RATE

Perhaps the most impressive finding from our analysis of the California experience is that, contrary to what many opponents have claimed, marital rape prosecutions can be very effective indeed.

The number of convictions as a percentage of the number of cases brought in California was actually extraordinarily high. In 64 percent of all cases where a charge was lodged, a conviction was obtained. In fully 89 percent of all cases which reached the prosecution stage a conviction was obtained.

Compare this, for example, to non-marital rape prosecutions. According to statistics for 1980 gathered by the California State Department of Justice, of 3,126 cases of forcible rape where arrests were made, 1,368 or 44 percent resulted in a conviction. Of all forcible rape cases reaching actual prosecution (2,026), the percentage resulting in conviction was 67 percent.(*8) In short, the prosecution of marital rape cases in California was more likely to result in success than the prosecution of non-marital rape.

This is an extremely important finding since a main concern of prosecutors is that their time will be wasted in pursuing marital rape cases. It is often imagined that the prosecution of such cases will be hampered by lack of evidence, doubt about whether sex was forced or consensual and prejudice among jurors against the idea of convicting a husband on the word of his wife. Based on California cases, these concerns do not seem to be well founded. Marital rape cases, once they get to the stage of prosecution, do not seem to be extraordinarily time consuming. In three-fifths of the cases, the offenders pleaded guilty (this was true of only one-fifth of the ordinary rape cases in Philadelphia), avoiding the necessity of a trial altogether. Hence the system actually worked very efficiently from a prosecutor's point of view.

It is significant that so many offenders pleaded guilty to the spousal rape charge. Defendants and their attorneys did not automatically think that it was an easy charge to beat. Nor did prosecutors. Otherwise, they might have been more likely to bargain away the spousal rape charge. The prosecutors used the charge and they convinced the defendants to plead guilty to it. This shows that the charge of spousal rape can be an effective piece of ammunition in the prosecutor's possession.

The number of guilty pleadings meant that there were rather few jury trials involving marital rape charges, making it harder to tell from the California experience how juries react to marital rape. However, there was a small amount of evidence. Of the nine jury trials, seven ended in convictions, showing that juries are not averse to bringing in a conviction against a husband, as some might have thought. Moreover, the fact that there was at least two acquittals, too, may relieve others of the fear that no man will ever receive a fair hearing in front of a jury on such a charge -- a difficult position for us to believe given the amount of popular scepticism that exists about marital rape.

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New York court strikes law, convicts husband for raping wife

By DAVID MARGOLICK
The New York Times

ALBANY — New York's highest court ruled Thursday that married men may be prosecuted for raping their wives.

In a 6-0 decision, the court of appeals struck down sections of the state's penal code that generally exempt men from prosecution for acts with their wives that would constitute rape or sodomy if done by a man with a woman other than his wife.

The decision apparently marks the first time the highest court in any state has invalidated an explicit statutory exemption for marital rape.

"There is no rational basis for distinguishing between marital rape and nonmarital rape," the court held. By making such a distinction, it continued, the law violated constitutional guarantees of equal protection.

For the same reason, the court struck down a provision of the law under which any man could be convicted of forcible rape. While women rarely commit rape, it held, there was no justification to exempt those who do from criminal sanction.

"The marital and gender exemptions must be read out of the statutes prohibiting forcible rape and sodomy," Associate Judge Sol Wachtler wrote for the court.

With the court's decision, New York joins 17 other states, including New Jersey, Connecticut and California, that have abolished the marital rape exemption in some or all cases. In most of those states, the changes were made through legislative action.

Previously, a husband in New York could be convicted of raping his wife only if the couple were legally separated or living apart by court order.

"A marriage license should not be viewed as a license for a husband to forcibly rape his wife with impunity," Wachtler wrote in a 25-page opinion. "A married woman has the same right to control her own body as does an unmarried woman."

Rape "is a degrading, violent act which violates the bodily integrity of the victim and frequently causes severe, long-lasting physical and psychic harm," he wrote. "To ever imply consent to such an act is irrational and absurd."

Rape had been defined under New York law as "sexual intercourse with a female by forcible compulsion." The statute went on, however, to specify that any woman who is the victim of such an act commited by her husband is not considered a "female" under the rape law.

The marital exemption dates to 17th-century England, a time when the law viewed women as the property of their husbands. It has been part of the criminal law of New York since colonial days.

While discarding portions of the state's rape law, the court left intact the conviction of Mario Liberta, a 26-year-old Buffalo man who was found guilty of raping his wife in front of their 2-year-old son in a hotel room nearly four years ago.

He had appealed the conviction, claiming he was unfairly singled out under the law. He is the only husband in the history of New York to be convicted of raping his wife. Because he was technically considered "unmarried" under the old law, the court held, his conviction need not be disturbed by its decision.

The Liberta case had generated intense interest throughout the state, notably among women's groups. Several elected officials, including the New York city council president, Carol Bellamy, and the Brooklyn district attorney, Elizabeth Holtzman, had urged the court to invalidate it.

Sarah Wunsch of the Center for Constitutional Rights, which had filed a friend-of-the-court brief on behalf of 26 women's organizations seeking to abolish the exemption, called the ruling "an important step in the continuing effort to end violence against women." She predicted it would have national ramifications.

In his opinion, Wachtler took issue with arguments that existing criminal sanctions were sufficient to deal with the problem of marital rape. While husbands could often be charged with assault, he noted, that offense was generally only a misdemeanor.

IN THE COURTS

MARITAL EXEMPTION FOR RAPE, SODOMY UNCONSTITUTIONAL, NEW YORK HOLDS

Court applies statutes in gender-neutral, marriage-netural fashion.

The marital and gender exceptions contained in New York's forcible rape statute deny unmarried males equal protection of the laws, the New York Court of Appeals decides. But this conclusion will help no rape defendant, whether married or unmarried, male or female; the court's solution to the constitutional problem is to strike the offending provisions and enforce the rest of the statute. (People v. Liberta, 12/20/84)

There is no rational basis for distinguishing marital from non-marital rape, or rape committed by males upon females from the rape of males by females, the court rules. The traditional notion that a married woman has given irrevocable implied consent to sexual intercourse with her husband cannot justify the marital exemption, the court stresses; rape is not a sex act but a degrading, violent assault to which a victim does not consent. To the argument that a female physically cannot rape a man, the court points to the statutory definition of "sexual intercourse" as "any penetration, however slight." This degree of contact, the court determines, can be achieved without male arousal, and, therefore, without consent. The marital exemption is also eliminated from the sodomy statute, which was already drawn in gender-neutral terms.

Digest of Opinion: The defendant, Mario Liberta, while living apart from his wife Denise pursuant to a Family Court protection order, forcibly raped and sodomized her in the presence of their 2½-year-old son. Under the temporary order of protection issued to the wife some two years after the defendant began beating her, the defendant was to move out and remain away from the family home, and stay away from Denise. The defendant was convicted of first-degree rape and first-degree sodomy.

[Text] Section 130.35 of the Penal Law provides in relevant part that "A male is guilty of rape in the first degree when he engages in sexual intercourse with a female * * * by forcible compulsion." "Female," for purposes of the rape statute, is defined as "any female person not married to the actor" (Penal Law 130.00, subd 4). Section 130.50 of the Penal Law provides in relevant part that "a person is guilty of sodomy in the first degree when he engages in deviate sexual intercourse with another person * * * by forcible compulson." "Deviate sexual intercourse" is defined as "sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and penis, or the mouth and the vulva" (Penal Law 130.00, subd 2). Thus, due to the "not married" language in the definitions of "female" and "deviate sexual intercourse," there is a "marital exemption" for both forcible rape and forcible sodomy. The marital exemption itself, however, has certain exceptions. For purposes of the rape and sodomy statutes, a husband and wife are considered to be "not married" if at the time of the sexual assault they "are living apart * * * pursuant to a valid and effective (i) order issued by a court of competent jurisdiction which by its terms or in its effect requires such living apart, or (ii) decree or judgment of separation, or (iii) written agreement of separation * * *" (Penal Law 130.00, subd 4). *[End text]*

The defendant asserts on this appeal that the temporary order of protection is not the type of order that enables a court to treat him and Denise as "not married" and that thus he is within the marital exemption. Also, he contends that both statutes violate equal protection because they burden some, but not all males, and that the rape statute also violates equal protection by burdening only men, and not women.

The defendant's first argument is undermined by a legislative memorandum, submitted with the original version of the 1978 amendment, that took an expansive view of the "not married" provision. Also, the plain language of the statute indicates that an order of protection is within the meaning of an order "which by its terms or in its effect requires [the spouses to live] apart." This language would be virtually meaningless if it did not encompass an order of protection, as the statute separately provides for the other obvious situation where a court order would require spouses to live apart. Accordingly, the defendant was properly found to have been statutorily "not married" to Denise at the time of the rape.

We turn now to the defendant's constitutional challenges.

[Text] Presently, over forty states still retain some form of marital exemption for rape. * * * Where a statute draws a distinction based upon marital status, the classification must be reasonable and must be based upon "some ground of difference that rationally explains the different treatment * * *" (Eisenstadt v. Baird, 405 U.S. 437, 447 [1972]) * * *.

We find that there is no rational basis for distinguishing between marital rape and non-marital rape. The various rationales which have been asserted in defense of the exemption are either based upon archaic notions about the consent and property rights incident to marriage or are simply unable to withstand even the slightest scrutiny. We therefore declare the marital exemption for rape in the New York statute to be unconstitutional.

Lord Hale's notion of an irrevocable implied consent by a married woman to sexual intercourse has been cited most frequently in support of the marital exemption * * *. Any argument based on a supposed consent, however, is untenable. Rape is not simply a sexual act to which one party does not consent. Rather, it is a degrading, violent act which violates the bodily integrity of the victim and frequently causes severe, long-lasting physical and psychic harm * * *. To ever imply consent to such an act is irrational and absurd. * * * A married woman has the same right to control her own body as does an unmarried woman * * *. If a husband feels "aggrieved" by his wife's refusal to engage in sexual intercourse, he should seek relief in the courts governing domestic relations, not in "violent or forceful self-help" * * *.

The other traditional justifications for the marital exemption were the common law doctrines that a woman was the property of her husband and that the legal existence of the woman was "incorporated and consolidated into that of the husband" (1 Blackstone, Commentaries on the Laws of England, 430 [1966

[d] • • •. Both these doctrines, of course, have long been rejected in this state. */End Text/*

More recent rationales advanced in support of the marital exemption includes marital privacy and promotion of reconciliation of the spouses. There is, however, no rational relation between allowing a husband to forcibly rape his wife and these interests. The right to privacy protects consensual acts, not violent sexual assaults. Just as a husband cannot invoke a right of marital privacy to escape liability fo[illegible]g his wife, he cannot justifiably rape his wife under the guise of a right to privacy. As for reconciliation, if the marriage has already reached the point where inte[illegible]ourse is accomplished by violent assault it is doubtful that there is anything left to reconcile. This is particularly true if the wife is willing to bring criminal charges against her husband.

Another rationale is that marital rape would be difficult to prove and lead to fabricated complaints by vindictive wives. Proving lack of consent to sexual intercourse, however is often the most difficult part of any rape prosecution, particularly when the rapist and victim have had a prior relationship. Similarly, the likelihood that married women will fabricate complaints would seem to be no greater than the possibility of unmarried women doing so. The criminal justice system is presumed to be capable of handling false complaints.

The final argument in defense of the marital exemption is that marital rape is not as serious an offense as other rapes and is adequately dealt with under other criminal statutes, such as the assault statutes, which provide for less severe punishment. The fact that rape statutes exist, however, is a recognition that the harm caused by a forcible rape is different and more severe than the harm caused by ordinary assault, which is generally a misdemeanor unless the victim suffers serious bodily injury or a deadly or dangerous weapon is used. There is no evidence to support the argument that marital rape has less severe consequences than other rape. On the contrary, numerous studies have shown that marital rape is frequently violent and has more severe, traumatic effects on the victim than other rape. See, e.g., D. Russell, Rape in Marriage, 190–199.

Among the recent decisions in this country, only one court has concluded that there is a rational basis for the marital exemption. See People v. Brown, 632 P2d 1025, 7 FLR 2791 (Colo 1981).

Presently New York is one of only ten jurisdictions that does not have a gender-neutral statute for forcible rape. A statute which treats males and females differently violates equal protection unless the classification is substantially related to the achievement of an important governmental objective. Caban v. Mohammed, 441 U.S. 380, 388 (1979).

The state first argues that it may constitutionally differentiate between forcible rapes of females and males because only females can become pregnant. This rationale has been accepted by this court and the U.S. Supreme Court in upholding statutory rape statutes directed at males alone. There is no evidence, however, that preventing pregnancies is a primary purpose of the statute fobidding forcible rape, nor does such a purpose seem likely. The very language of the statute shows that its overriding purpose is to protect a woman from an unwanted, often violent intrusion of her body.

The state further claims that the discrimination is justified by the "probability of medical, sociological, and psychological problems unique" to females. This is an archaic generalization grounded in long-standing stereotypical notions that simply cannot serve as a legitimate rationale for a penal statute.

Finally, the state suggests that a gender-neutral rape law is unnecessary because a woman either cannot actually rape a man or, if she can, such attacks are extremely rare. The argument is premised on the notion that a man can only engage in sexual intercourse if aroused, and if he is aroused, then he is consenting. But "sexual intercourse occurs upon any penetration, however slight," Penal Law 130.00. This degree of contact can be achieved without a male being aroused and thus without his consent. Nor can the rarity of such attacks support gender discrimination. Otherwise, females would be exempt from many serious offenses that they rarely commit. Accordingly, we hold that § 130.35 violates the Equal Protection Clause because it exempts females from criminal liability for forcible rape.

/Text/ When a statute is constitutionally defective because of underinclusion, a court may either strike the statute, and thus make it applicable to nobody, or extend the coverage of the statute to those formerly excluded. • • •

This court's task is to discern what course the Legislature would have chosen to follow if it had foreseen our conclusions as to underinclusiveness. • • •

The inevitable conclusion is that the Legislature would prefer to eliminate the exemptions and thereby preserve the statutes. Accordingly we choose the remedy of striking the marital exemption from Penal Law 130.35 and Penal Law 130.50 and the gender exemption from Penal Law 130.35, so that it is now the law of this state that any person who engages in sexual intercourse or deviate sexual intercourse with any other person by forcible compulsion is guilty of either rape in the first degree or sodomy in the first degree. Because the statutes under which the defendant was convicted are not being struck down, his conviction is affirmed. */End Text/* — Wachtler, J.

(People v. Liberta; NY CtApp, 12/20/84)

SALARIED DOCTORS LACK DIVISIBLE GOODWILL

[illegible]ourt must disclose factors and methods used to determine goodwill; factors listed.

A salaried physician does not have goodwill that can be divided upon divorce, the Washington Supreme Court holds. The goodwill of a professional is separate from his earning capacity and is a product of his practice before the public, the court says, so a physician who does not practice cannot have goodwill. The court also decides that a trial court must disclose the factors and methods used to determine goodwill, and it explains five commonly accepted methods. (In re Hall, 12/13/84)

Digest of Opinion: At the time of trial, Phillip, age 41, had a good reputation in the community as a consulting cardiologist. His average gross yearly earnings in the three years preceding trial were $52,412. Judith, age 40, was an untenured professor at the University of Washington with no expectation of tenure in the foreseeable future. Her average gross yearly earnings were $32,750 in the three years preceding trial. She testified that her decision to pursue an academic career was attributable primarily to the need for a flexible schedule to care for the Halls' children. Although she is widely published and enjoys a reputation as one of the 10 top physicians in the nation in the field of pediatric genetics, there are few, if any, medical career opportunities outside academia, especially in the Seattle area. Numerous medical schools across the nation have offered her employment with salaries up to $60,000.

Evaluation of professional goodwill is a troublesome issue. Since 1976, professional goodwill has been recognized in Washington as property of an intangible nature subject to division in a marriage dissolution. In 1979, reviewing the decisions of other courts, this court noted that a number of states had refused, in a divorce proceeding, to assign a value to goodwill of a professional practice, but recognized it as a marital asset. In In re Fleege, 588 P2d 1136 (1979), we held that although professional goodwill is not readily salable, the important consideration is not whether the goodwill of the practice could be sold without the personal services of the professional but whether it has value to him. In Fleege, this court set out the factors for valuing goodwill: the practitioner's age; health; past demonstrated earning power; and professional reputation in the community as to his judgment, skill, knowledge and his comparative professional success. These have become known as the Fleege factors. Two areas surrounding these factors must be clarified: (1) the first step in evaluation under the Fleege factors is the determination of the existence of goodwill; (2) several accounting or appraisal methods may be used by the trial court in conjunction with these factors.

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November 1984

COURTS DECLARE MARITAL RAPE A CRIME IN NEW YORK, FLORIDA AND VIRGINIA

by Monica Rickenberg, Legal Intern, NCOWFL
and Joanne Schulman, Staff Attorney, NCOWFL

Rape is widely recognized as a serious felony—second in seriousness to murder in most states. However, one particular kind of rape—marital rape—has been treated very differently. As of January 1984, the rape laws of 28 states still provide an express marital rape exemption; only eight states have entirely abandoned the exemption.[1] The courts, however, have been more responsive. In 1981, courts in New Jersey,[2] Massachusetts,[3] and Florida[4] refused to apply the alleged "common law" marital rape exemption to their rape laws and held that husbands were not immune from prosecution for the rape of their wives. In 1983 and 1984, three more courts rejected the exemption, *People v. De Stefano*,[5] *State v. Rider*,[6] *Weishaupt v. Virginia*.[7] These cases form a substantial and unanimous body of case law which recognizes that a husband's forcing sexual intercourse upon his wife is rape.

People v. De Stefano

People v. De Stefano is the first case in the country to examine the constitutionality of an express statutory marital rape exemption.[8] Although *De Stefano* is a lower court decision, it is a landmark case that lays the groundwork for future constitutional challenges to the marital rape exemption. In reaching its decision that New York's marital rape exemption violates the equal protection rights of married women, the court examined and rejected the traditional justifications for the exemption in clear powerful language, going further than any previous case in pointing out the absurdity and inherent sexism of the exemption and the arguments used to defend it.

The defendant was alleged to have entered the residence in violation of an Order of Protection and, at knifepoint, raped his wife. Defendant moved to dismiss the rape indictment, and it is upon this pre-trial motion that the case was decided.

Because the spouses were living apart at the time of the attack and the victim-wife had obtained an Order of Protection, the husband was considered "not married" under New York's spousal exemption.[9] The defendant claimed that his equal protection rights were violated because New York law deprived him of the right to unconsented sexual intercourse with his wife, a right the law grants to other husbands. Defendant also claimed that New York's rape law violated his due process rights by failing to notify him that he was not allowed to engage in nonconsensual sexual intercourse with his estranged wife and that such action could result in a rape charge.

The court examined the traditional justifications for the marital rape exemption, and determined that none constituted a governmental interest sufficient to meet any of the three tests associated with equal protection analysis (rational basis, middle tier and strict scrutiny).

The court examined the origins of the marital rape exemption. The court found that Hale's Doctrine[10] was not judicial authority and thus "should not have been considered a binding and definitive statement of the common law." *De Stefano* at 510.

The court held invalid the "implied consent" argument, that upon marriage a woman irrevocably consents to sexual intercourse with her husband and relinquishes the right to say "no" in any and all situations. The court relied on the recognized constitutional right of a woman to have an abortion and use birth control without her husband's approval. The court found that the "logical extension" of those rights is that a woman has the right to refuse the physical act that leads to pregnancy, and that a woman's right "to individual autonomy and to control procreation are but part of the more comprehensive right to bodily integrity." *De Stefano*, at 513-514.

The argument that a wife is the property of her husband was dismissed by the court as having "no validity" in the United States. *De Stefano*, at 515. The court rejected the related theory that, upon marriage, husband and wife become one legal entity and that a man cannot therefore be guilty of raping himself. The court noted that wives' separate legal identity was established as long ago as 1848 by the "Married Women's Act."

The court addressed the argument that the abandonment of the marital rape exemption would cause insurmountable evidentiary problems and invite fabricated complaints of marital rape. The court noted that lack of consent is the most difficult element to prove in all rape cases, not merely interspousal rape cases. Further, fabricated complaints of marital rape would be unlikely given the stigma society attaches to rape victims. The court also pointed out that false reports of other crimes occur, but "(o)nly in marital rape do we remove an entire class of potential victims from the protection of the law in order to protect some abstract possibility of a false claim that the criminal justice system is unable to deal with appropriately." *De Stefano*, at 515.

The court dismissed as "ludicrous" the argument that the prosecution of husbands for raping their wives would impede reconciliation of marriages. *De Stefano*, at 515. The court rejected the argument that other remedies are available to the victim of interspousal rape, pointing out that in the case before the court the victim had already obtained an Order of Protection and was nevertheless raped at knifepoint.

Finding that there was no governmental interest or basis for the marital rape exemption so as to justify treating victims of marital rape differently from all other rape victims, the court struck down New York's statutory marital rape exemption as violative of the equal protection clauses of the state and federal constitutions. The court disposed of defendant-

(cont'd. on p. 4)

CHILD SUPPORT ENFORCEMENT AMENDMENTS
(cont'd. from p. 2)

these services. Consequently, programs should now be more responsive to non-AFDC families. However, there is still a cap on federal reimbursement of non-AFDC cases, so that some IV-D offices may still resist offering services.

Publicizing Availability of Services

States must publish information about the availability of enforcement services, so that the public will be better informed concerning use of the state's office of child support. Also, states may provide payment tracking for anyone who requests it at a fee no greater than $25.

AFDC Families

Several provisions will benefit welfare families who have assigned their child support to the state. When a family leaves the welfare rolls as a result of child support collection, it will be entitled to a four month extension of medicaid eligibility, and to continued use of enforcement services. Annual notice of the child support collected must be given to each AFDC family.

The Deficit Reduction Act (P.L. 98-369) passed earlier this year provides that $50 of child support collected per month can be kept by families applying for or receiving AFDC without any concomitant deduction from their AFDC grant. Although child support collection decreases food stamp eligibility by an amount depending on income, there will still be a net benefit. The effective date is October 1, 1984.

Other Provisions

Other significant provisions of the 1984 Amendments include the establishment of broadly representative Child Support Commissions in each state by December 1, 1984 to study child support systems and to report by October 1, 1985; creation of special federal funds for grants to promote interstate collections; and incentive payments to the states for interstate collections.

It is important for child support advocates to monitor the IV-D Agencies and participate on Commissions, in order to help make these Amendments effective for poor women and children. ■

A more detailed summary of the Child Support Enforcement Amendments and a copy of the Amendments are available from NCOWFL for $3.00 to cover the costs of copying and postage.

MARITAL RAPE A CRIME IN NEW YORK, FLORIDA, AND VIRGINIA
(cont'd. from p. 3)

husband's other constitutional claims in holding that the Order of Protection which directed the defendant-husband to stay away from his estranged wife and to refrain from violence toward her constituted sufficient notice that he could be charged with rape. Furthermore, the court held that no specific notice was necessary since the defendant never had a right to engage in forced sexual intercourse with his wife.

State v. Rider

On April 17, 1984, the Florida Court of Appeals Third District held in *State v. Rider* that Florida's sexual battery statute, which contains no express spousal exemption, does not incorporate a "common law" exemption.

The *Rider* case involved spouses who were living together as husband and wife at the time of the rape. No divorce or separation proceedings had been initiated, and no temporary restraining order or separation agreement existed. Defendant moved to dismiss the sexual battery charges on the basis of a common law interspousal rape exemption. The trial court granted defendant's motion on the basis that no objective manifestation of the wife's withdrawn consent to sexual intercourse with her husband existed, such as legal or physical separation of the parties. The State appealed the dismissal and the Court of Appeals reversed and remanded for prosecution.

Rider is the second Florida case to address the marital rape exemption. In the 1981 case of *Florida v. Smith*,[11] the Fifth District held that no "common law" exemption exists in Florida. *Smith* involved spouses who were living apart at the time of the alleged attack. Although the *Smith* court explicitly stated that its decision was based on a finding that no common law spousal exemption exists in Florida (not on the theory that the victim-wife had revoked her "implied consent" by obtaining a restraining order and filing for a divorce), it was nevertheless unclear whether future courts would limit *Smith* to separated spouses only. The Court of Appeals in its decision in *Rider* adopted a broad interpretation of *Smith*, refusing to distinguish between spouses living together and those living apart, for purposes of eliminating the marital rape exemption. *Rider* joins a 1981 Massachusetts case, *Commonwealth v. Chretien*,[12] in expressly holding that no "common law" marital exemption exists even in the case of cohabitating spouses.

As in *De Stefano*, the *Rider* court found that Sir Matthew Hale's "single statement, which stands alone, naked of citation to any authority judicial or otherwise," provides no reasonable basis for the exemption, *Rider* at 887. The court held that no common-law spousal exemption had ever been adopted in Florida. The court hypothesized that even if such an exemption had at one time existed in Florida, the repeal of Florida's rape law and its replacement with a "sexual battery" statute would have abolished the exemption by "abrogat(ing) any common-law assumptions concerning the crime of rape." *Rider* at 888.

The court found that "even if we were to assume that a common law implied consent interspousal exception once existed and still exists . . . it does not follow...that such consent can never be withdrawn . . ." *Rider* at 888. The court found that since a spouse may terminate the marriage contract, she may terminate a "term" of the contract, consent to sexual intercourse. The court noted that the husband's remedy for this "breach of contract" is in court, not in violence against

(cont'd. on p. 5)

his wife. Finally, in refusing to adopt a common law exemption, the court noted that when the validity of a common law doctrine is extremely dubious the court can take into account societal changes in determining whether to apply the doctrine.

The two Florida cases are the first in the country to expressly find that a common law spousal exemption was never adopted in their state. While the landmark cases of *Commonwealth v. Chretien* and *State of New Jersey v. Smith*[11] severely criticized the Hale Doctrine, they assumed that it was part of the common law. Thus, the Florida cases are extremely significant in states which have no express statutory exemption, for they suggest that when courts of such states adjudicate marital rape cases they are not confronted with a choice of *applying* or *abolishing* a legitimate common law doctine, but rather of whether or not to *adopt* an antiquated doctrine of dubious origins, one which is incompatible with 20th century legal and societal concepts of marriage and women's autonomy.

Weishaupt v. Virginia

Weishaupt v. Virginia, involves a rape statute which, like Florida's, contains no express spousal exemption. The Virginia Supreme Court held that a "common law" marital rape exemption does not apply when there has been a *de facto* end to the marriage. The court refused to decide whether a "common law" exemption should be abandoned altogether, limiting its holding to the particular facts of the case before it.

In *Weishaupt*, the victim-wife had been living apart from her husband and had not engaged in sexual intercourse with him for almost a year prior to the attack. She had not filed for or obtained a divorce, order of protection or separation agreement. However, she had consulted a lawyer regarding a divorce and was advised to wait until she had been separated for one year before initiating divorce proceedings. Defendant-husband's motion to dismiss the rape indictment on the basis of a common law marital rape exemption was rejected by the trial court. Defendant was tried before a jury and convicted of attempted rape. The Virginia Supreme Court affirmed the conviction, holding that a common law exemption did not apply where, as in the instant case, the victim-wife had clearly manifested her intent to end the marriage.

The *Weishaupt* court examined the history of the "common law" exemption and determined that Hale's absolute" exemption is not and never was English common law. The court found that under English common law a wife could revoke her implied consent to sexual intercourse with her husband by obtaining a court order of separation. The Court found that a written separation agreement entered by both parties constituted a revocation of the wife's "implied consent," although living apart from one's husband and having filed for, but not having obtained, a divorce did not.

Thus, under the *Weishaupt* court's understanding of the English common law, the defendant in the instant case could not be guilty of raping his wife. However, the court found that both Virginia statutory law and case law empower courts "to adopt from English common law those principles that fit our way of life and reject those which do not." *Weishaupt*, at 12. It found that Virginia cases "suggest that if a woman's independent control over her property is protected by law, then her independent control over her physical person should likewise be protected." *Weishaupt*, at 14.

The court also found that an absolute marital rape exemption is inconsistent with Virginia's no-fault divorce law which requires spouses to live apart for a specified time without cohabitation before obtaining a no-fault divorce. Since the law contemplates a voluntary withdrawal by either spouse from the marital relationship, it "embodies a legislative endorsement of a woman's unilateral right to withdraw an implied consent to marital sex." *Weishaupt*, at 16. Since a wife has a statutory right to make a *de facto* withdrawal from the marriage contract, it would be irrational to forbid her from revoking a "term" of the contract, consent to sexual intercourse.

The court deemed "absurd" defendant-husband's contention that abandonment of the marital rape exemption would be disruptive to marriages. "[I]t is hard to imagine how charging a husband with the violent crime of rape can be more disruptive of marriage than the violent act itself." *Weishaupt*, p. 19.

The *Weishaupt* court refused to address the argument that a marital rape exemption should be abandoned altogether, and thus left open the question of whether an exemption would apply if the spouses were cohabiting at the time of the rape.

While *Weishaupt* does not go as far as *De Stefano* or *Rider*, the majority opinion does reject the application of the exemption where there has been a *de facto* end to the marriage; it does not require the victim to have obtained or filed for a divorce, separation or order of protection. Thus, *Weishaupt* is an important step in the right direction.

Conclusion

There has been significant progress in the courts in abolishing the marital rape exemption. *De Stefano*, *Rider* and *Weishaupt* offer a basis to hope that courts will no longer condone rape.

Both the *De Stefano* and *Weishaupt* courts scornfully reject the argument that marital rape prosecutions will injure marriages by preventing reconciliation. As the *Weishaupt* court pointed out, it is the husband's violence, not society's recognition and punishment of that violence, which is destructive to marriage. *Weishaupt*, at 19.

De Stefano, *Weishaupt* and *Rider* recognize that it is time that rape laws be employed to protect women's autonomy. ■

The next issue of the *Women's Advocate* will present an update on state statutory changes in the last three years. For state-by-state summary of the exemption in criminal statutes see NCOWFL's *Marital Rape Exemption Packet. Price $9.00 for copying and postage.*

(cont'd. on p. 6)

FOOTNOTES FOR MARITAL RAPE A CRIME
(cont'd. from p. 5)

FOOTNOTES

[1] See NCOWFL's *Marital Rape Exemption Packet* which includes a state-by-state summary of the exemption in criminal statutes. Price: $9.00.

[2] *State v. Smith*, 426 A.2d 38 (N.J. 1981); *State v. Morrison*, 426 A.2d 47 (N.J. 1981).

[3] *Commonwealth v. Chretien*, 417 N.E.2d 1203 (Mass. 1981).

[4] *State v. Smith*, 401 So.2D 1126 (Fla. Ct. App. 5th Dist. 1981).

[5] 467 N.Y.S.2d 506, 121 Misc.2d 113 (1983), Clearinghouse No. 36,388.

[6] 449 So. 903 (1984), Clearinghouse No. 36,890.

[7] 315 SE2d 847 (1984), Clearinghouse No. 36,889.

[8] New York Penal Law Section 130.00(4). New York's marital rape exemption is "partial." Under certain circumstances spouses are defined as "not married" for purposes of the exemption, and therefore certain husbands are *not* granted immunity for the rape of their wives. New York Penal Law 130.00(4) defines "not married" as spouses who are living apart pursuant to "(i) order issued by a court of competent jurisdiction which by its terms or in its effect requires such living apart, or (ii) decree or judgment of separation, or (iii) written agreement of separation . . . which contains provisions specifically indicating that the actor may be guilty of the commission of a crime for engaging in conduct which constitutes an offense prescribed by this article against and without the consent of the female."

[9] New York Penal Law § 130.00(4)(b)(i); see note 8, *supra*.

[10] "[T]he husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract . . . [I]n marriage she hath given up her body to her husband. . . ." 1 Hale, *Pleas of the Crown* 628-29 (1736). This statement, known as Hale's Doctrine, first appeared in a treatise (not a case) written by Lord Matthew Hale, a 17th century English jurist. Lord Hale provided no supporting authority for his statement, and this lack of authority was subsequently criticized by several English justices.

[11] See footnote 4, supra.

[12] See footnote 3, supra.

[13] See footnote 2, supra. ■

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When husband rapes wife

By ALLEN HOUSTON
United Press International

PORTLAND Ore. — Six years after Greta Rideout became a "sacrificial lamb" and charged her husband with raping her in their bedroom, more and more states are making it illegal for men to force their wives into sex.

Experts disagree, though, over the effectiveness of the laws and whether the nationally publicized Rideout trial helped or hurt efforts to pass marital-rape legislation.

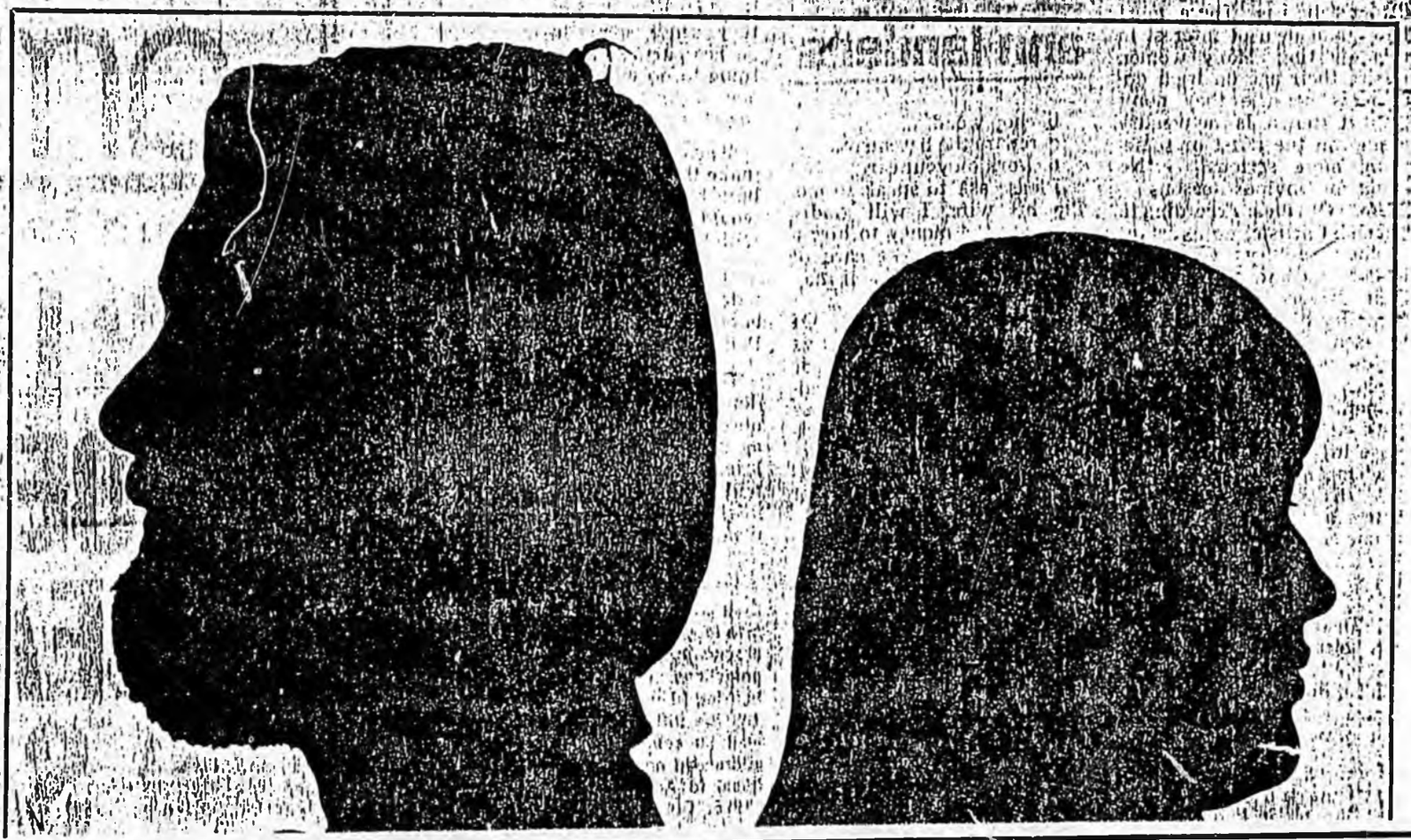
A Miami man was found guilty last month of raping his wife, but convictions have been relatively scarce nationwide.

Supporters of marital-rape laws complain police and prosecutors are not taking advantage of the new penalties. Opponents argue that other legal remedies are sufficient, and that juries are reluctant to send a husband to prison for 20 years and brand him forever as a rapist.

Greta Rideout was the first woman to charge a husband with rape while they were married and living together. John Rideout was acquitted in Salem, Ore., but the couple later divorced and Rideout pleaded guilty to subsequently forcing his way into his ex-wife's apartment.

"Those were the dark ages before Greta became a sacrificial lamb," said Laura X, who founded the National Clearinghouse on Marital Rape in Berkeley, Calif., and took her last name to signify the "anonymity" of women throughout history.

Oregon was the third state to allow prosecution of husbands for raping their wives. Husbands now can be prosecuted in 20



that other legal remedies are sufficient, and that juries are reluctant to send a husband to prison for 20 years and brand him forever as a rapist.

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Oregon was the third state to allow prosecution of husbands for raping their wives. Husbands now can be prosecuted in 20 states and the District of Columbia, according to the clearinghouse.

In another 26 states, including Pennsylvania, New York, Ohio and Michigan, prosecution is possible only if the man and woman are living apart or have filed for separation or divorce. Four states, Alabama, South Dakota, Vermont and West Virginia, do not recognize marital rape as a crime.

Pennsylvania's legislature is considering a measure to toughen its law to apply when husbands and wives live together. The bill, which has twice failed to gain approval, has passed the state House and is awaiting action in the Senate, although it will die unless it comes up for a vote soon.

Carol Coady, a lobbyist pushing for passage of the bill, said part of the battle has been getting across the idea that rape does not have to be by a stranger.

"The act of rape is never sex; it's always an act of violence," she said. "It doesn't matter that the man has the title of husband — rape is rape. That's hard to convince some legislators."

Marital rape carries a special mental trauma for women, she said.

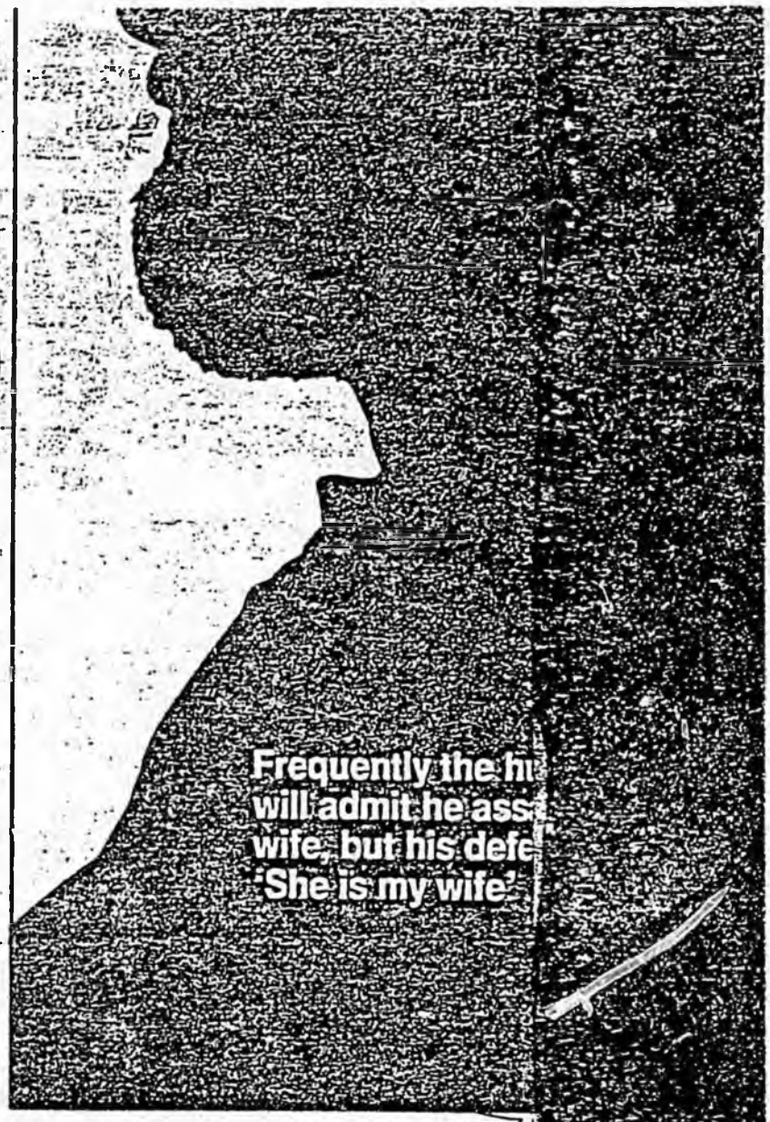
"When you are raped by a stranger, you have to live with the memory," she said. "When you are raped by your husband, you have to live with the rapist."

David Finkelhor, associate director of the Family Violence Research Program at the University of New Hampshire, said the mental damage can be profound.

"It stems in part from betrayal: a woman thought this man she married was going to love and protect her and have her best interests at heart," he said. "She trusted him in a very intimate way, and he violated that trust."

Finkelhor estimates as many as 10 percent to 14 percent of all married women are victims of marital rape, based on studies in Boston and San Francisco. And he says that of 50 women he studied who had been raped by their husbands, almost half suffered battering rapes.

"One of the misconceptions about marital rape is that people imagine it's a marital tiff: He wants to have sex, she doesn't, he wins," Finkelhor said. "In fact, in a lot of marital rapes, it's heavy duty stuff — knives and guns and blackjacks and bruises and injuries and terror."



One victim said her husband started to assault her a year after they were married and the beatings continued for years, culminating in a rape in front of their 2-year-old son.

"He beat me up for a half hour for burning the eggs," she said. "He ripped off my pajamas in one pull, beat me up and told me if I didn't do what he said, he was going to kill me and kill my son."

She said he raped her 12 more times in the six weeks before she moved out. They eventually divorced, and "it took me a long time to get over it. I had a hard time for a while trusting guys."

Finkelhor said the brutality makes it possible to obtain convictions in many cases, despite opponents' claims that juries are reluctant to take one side's word over another.

Finkelhor studied 39 cases in California over a two-year period, and while about one-fourth of the cases were dropped, the convic-

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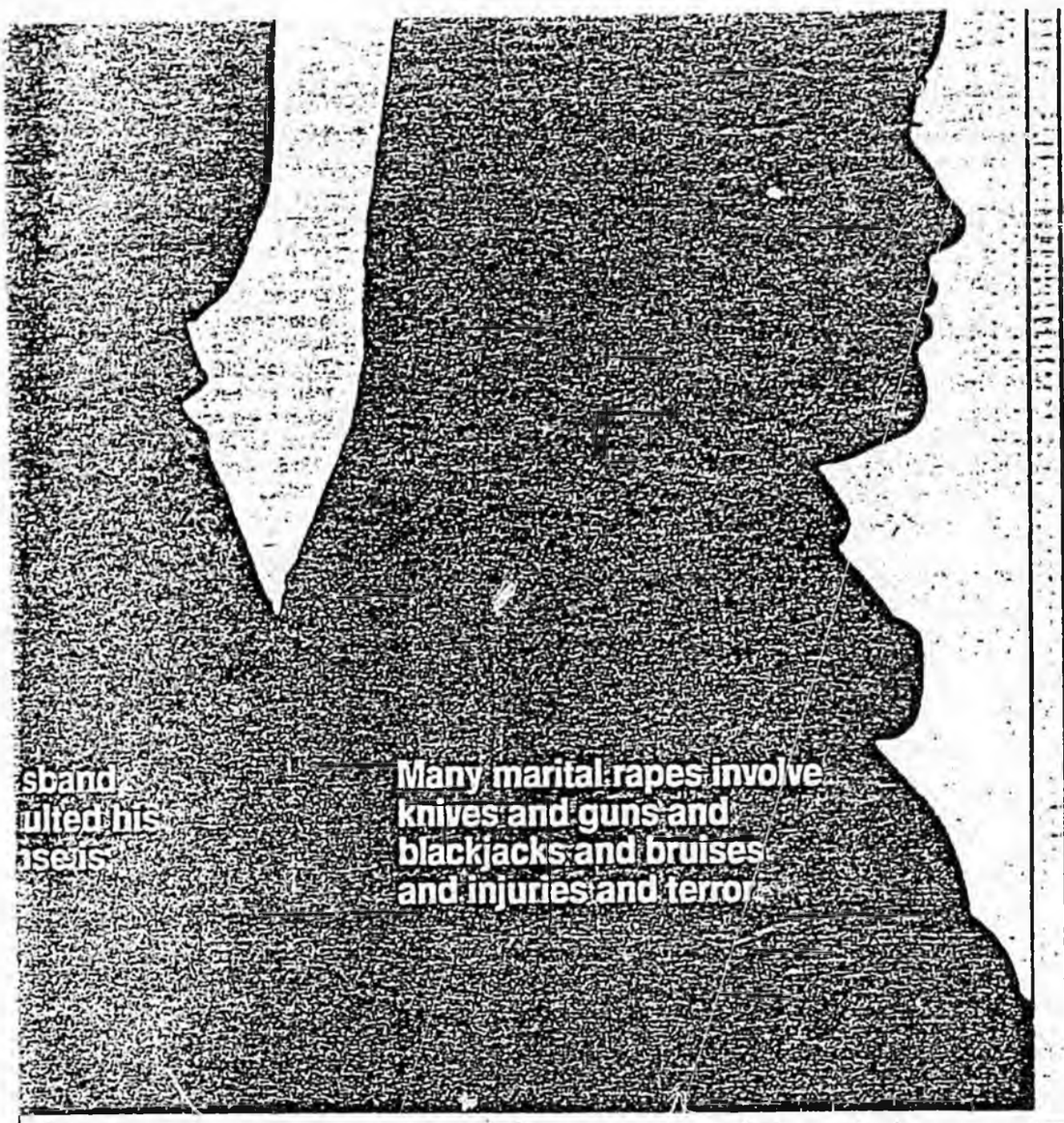

(3)

tion rate was 87 percent for the ones that were prosecuted, higher than for other rape charges.

Coady said many times the husband will admit he assaulted his wife, "but his defense is, 'She is my wife.' "

Finkelhor said the "modest" number of cases in California during the two-year period he studied negates another argument of opponents: that the courts would be flooded by vindictive wives out to gain leverage in divorce proceedings.

In fact, California and Oregon have had relatively few prosecutions.

Steve White, former executive director of the California District Attorneys Association, said he advised legislators that many cases would be rejected by prosecutors because they would be hard to prove.

"Overall, I think it's a positive statute, good to have on the books," said White, who is now the state's chief assistant attorney general.

"I think people should not expect too much from it, though. Most of these cases are never reported. Of those that are reported, it's difficult to prosecute, and relatively few prosecutions successfully result."

He estimated that no more than 100 to 200 cases are prosecuted annually in the state and fewer than half probably go to trial.

Nevertheless, the law acts as a deterrent, White said. By passing it, the state was saying, "We find this behavior absolutely intolerable and criminal," he said. "Incredibly, some people felt there was nothing criminally wrong with it."

In Oregon, only four cases have been prosecuted, including Rideout. One resulted in a rape conviction, with two others ending in convictions on other charges, said Peter Sandrock, a prosecutor in Benton County, Ore., who speaks on behalf of marital-rape laws to legislatures around the country.

"Probably the moral statement is the most important aspect of it, that we're now willing to say the marriage license is not a license to do with your spouse as you wish."

See Page J-3, MARITAL

(4)

Marital rape: Legislatures and courts move in on abusive mates

Continued from Page J-1

he said.

Marion Rider of Miami, whose husband was found guilty last month of raping her, said afterward that she wishes other abused women would file charges against their husbands.

"I hope they have the courage to do what is right," she said.

Oregon lawyer Charles Burt, who defended John Rideout six years ago, thinks the law should be changed so the crime is not called rape and the penalty is not so severe. That could lead to more successful prosecutions, he said.

"I don't want to say that a husband has a right to rape his wife. That's reprehensible, criminal. But it should not be rape," he said. "Rape is a stranger assaulting a woman and forcing sex. It's more serious than a husband who has had sex for years forcing sex. I think jurors think that way."

Pennsylvania State Rep. Lois Hagarty of Philadelphia, a former assistant district attorney, said she voted against her state's bill because "I don't feel that in a married situation, where there once has been consent to intercourse, that the nature of the crime is the same as rape."

> **"When you are raped by a stranger, you have to live with the memory. When you are raped by your husband, you have to live with the rapist"**
>
> — Carol Coady

"What (married) women are really objecting to in forced sexual intercourse is the physical violence that accompanies it," she said. "Our assault laws cover that."

Not only are more legislatures passing laws, but the quality of their debate has improved over the years, supporters say. In Oregon, the debate was "reasonably crude" at times, said Oregon prosecutor Sandrock.

"I see a greater willingness to debate on the merits," he said, "as opposed to the traditional and Neanderthal attitudes about phony complaints and vindictive, bitchy women and, 'What's the state doing in the bedroom, anyway?' "

Passing laws is just the start, though, said researcher Finkelhor. Doctors and counselors need to be more aware of the problem, he said, and prosecutors should apply the laws more.

"Passage of the law is fine, but it's out of the news in a week," he said. "Prosecutions serve a very important consciousness-raising function."

Yet even some supporters believe the Rideout prosecution still is impeding marital-rape legislation in many states by raising fears of another media circus like the one created in that case.

"As I have gone to these various other states, the Rideout case is a question that comes up," said Sandrock. "They all want to avoid the spectacle of Rideout."

Many, though, believe the case brought the subject out of the closet and gave other women the courage to stand up to sexual abuse at home.

"The Rideout case was really a watershed," said Finkelhor. "Whatever happened in that case, it was a powerful eye-opener to a lot of people."

The Rideouts have disappeared from public view. Greta Rideout has moved from the Northwest and works on a newspaper and goes to school, but she "has not gotten over it," said lobbyist Coady, who spoke to her recently. "She refuses to talk publicly."

John Rideout has worked as a cook in restaurants in the Salem area, but it is hard to find jobs, said defense attorney Burt.

"John and Greta were not bad people," Burt said. "They were nice young people. Another time, another place, they were the kind of kids you'd like to know. They were good-looking youngsters, bright. This thing just got overwhelming."

Viking trail lures adventurers in old-style ship

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tional devices such as a compass, radar and a radio, are also on board.

"Before I started I had no experience sailing except as a small boy at home," Thorseth says. "But my experience in the open sea is wide and long. I like the challenge."

In the past he has taken a series of expeditions to the Arctic and around Iceland and Greenland. In 1982 he led the first Norwegian expedition to reach the North Pole across ice.

One of the main purposes of the current expedition, called Operation Viking, is to learn as much as possible about the capabilities of the ancient knarrs: how seaworthy they are, what kind of expectations of most of the scholars. We can sail into the wind with an angle of 50-60 degrees and it can sail 179 nautical miles in 24 hours. For short periods we reached a top speed of 12 knots."

In addition to gaining scientific knowledge, another purpose of the expedition is to acquaint people with Norwegian history and to dispel the notion that all the Vikings were fierce warriors. According to Thorseth, many Norsemen were farmers, merchants and navigators.

Thorseth will have many opportunities to share his knowledge as the Saga Siglar makes its way up the Hudson River, through the Great Lakes and down the Mississippi River, stopping at ports along the way. When the boat sets sail from Florida heading for the Panama Canal and the Pacific Ocean, Thorseth's whole family — his wife, Karl and his two sons, Erik and 9-year-old Njaal — will be on board.

Looking back on the trip so far, he says, "I've been on several expeditions and know about many other people's expeditions. Very often there is a tendency to have conflicts on board after some time. I've been so happy with the guys.

"Everyone contributed equally. They're all so clever. We've had fresh bread or a cake every day even during the storm. They are so professional. So for me as an expedition leader it has been really great. The experience is so special — I can't think of anything better."